IN THE

Supreme Court of the United States

October Term, 1979

No. 78-253

NOLAN ESTES, et al., *Petitioners,*
v.
METROPOLITAN BRANCHES OF THE DALLAS N.A.A.C.P., et al.

No. 78-282

DONALD E. CURRY, et al., *Petitioners,*
v.
METROPOLITAN BRANCHES OF THE DALLAS N.A.A.C.P., et al.

No. 78-283

RALPH F. BRINEGAR, et al., *Petitioners,*
v.
METROPOLITAN BRANCHES OF THE DALLAS N.A.A.C.P., et al.,

BRIEF FOR EDDIE MITCHELL TASBY, ET AL., RESPONDENTS

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OPINIONS BELOW

I. The principal opinions and orders in this case are as follows:

1. Memorandum Order denying preliminary injunction on school construction filed December 15, 1970, unreported.

2. Order of Court of Appeals for the Fifth Circuit June 3, 1971, vacating order as to school construction, *Tasby* v. *Estes,* 444 F.2d 124 (5th Cir. 1971).

3. Memorandum Opinion filed July 16, 1971 on violation issue, *Tasby* v. *Estes,* 342 F.Supp. 945 (N.D. Tex. 1971).

4. Judgment entered August 2, 1971, unreported.

5. Supplemental Order for Partial Stay of Judgment, filed August 9, 1971, reported at 342 F.Supp. 949.

6. Memorandum Opinion on Final Desegregation Order, filed August 17, 1971, reported at 342 F. Supp. 949.

7. Supplemental Opinion regarding Partial Stay of Desegregation Order, filed August 17, 1971, reported at 342 F. Supp. 955.

8. Opinion of court of appeals filed July 23, 1975, *Tasby* v. *Estes,* 517 F.2d 92 (5th Cir.), *cert. denied* 423 U.S. 939 (1975).

9. Memorandum Opinion and Order denying interdistrict relief, filed December 11, 1975, *Tasby* v. *Estes,* 412 F.Supp. 1185 (N.D. Tex. 1975).

10. Opinion and Order on school desegregation plans filed March 10, 1976, *Tasby* v. *Estes,* 412 F.Supp. 1192 (N.D. Tex. 1976).

11. Supplemental Opinion and Final Order on desegregation plan filed April 7, 1976, reported in part at 412 F.Supp. 1210. (N.B: The reported opinion omits the important appendices to the Final Order which detail the court-ordered plan. This portion is reprinted in the Appendix to the Petition for Certiorari in No. 78-253 at pp. 84a-125a; and see corrections at 127a-129a.)

12. Memorandum Opinion granting plaintiffs attorneys fees, filed July 20, 1976, *Tasby* v. *Estes,* 416 F.Supp. 644 (N.D. Tex. 1976).

13. Opinion of Court of Appeals for the Fifth Circuit filed April 21, 1978, *Tasby* v. *Estes,* 572 F.2d 1010 (5th Cir.), rehearing denied 575 F.2d 300 (1978).

II. The reported opinions in a prior desegregation case against the Dallas Independent School District which was litigated from 1955 to 1965 are as follows:

1. *Bell* v. *Rippy,* 133 F.Supp. 811 (N.D. Tex. 1955).

2. *Brown* v. *Rippy,* 233 F.2d 796 (5th Cir. 1956), *cert. denied* 352 U.S. 878 (1956).

3. *Bell* v. *Rippy*, 146 F Supp. 485 (N.D. Tex. 1956).

4. *Borders* v. *Rippy*, 247 F.2d 268 (5th Cir. 1957).

5. *Rippy* v. *Borders*, 250 F.2d 690 (5th Cir. 1957).

6. *Boson* v. *Rippy*, 275 F.2d 850 (5th Cir. 1960).

7. *Borders* v. *Rippy*, 184 F.Supp. 402 (N.D. Tex. 1960).

8. *Borders* v. *Rippy*, 188 F.Supp. 231 (N.D. Tex. 1960).

9. *Boson* v. *Rippy*, 285 F.2d 43 (5th Cir. 1960).

10. *Borders* v. *Rippy*, 195 F. Supp. 732 (N.D. Tex. 1961).

11. *Britton* v. *Folsom*, 348 F.2d 158 (5th Cir. 1965).

12. *Britton* v. *Folsom*, 350 F.2d 1022 (5th Cir. 1965).

JURISDICTION

The jurisdictional requisites are adequately set forth in the briefs for petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are adequately set forth in petitioners' briefs

QUESTIONS PRESENTED

1. Respondents Tasby et al., the original plaintiffs, believe that the question presented herein in as follows:

Whether the court of appeals properly remanded the case for a new pupil assignment plan and for further findings where:

a. The district court ordered the desegregation of a *de jure* segregated school system under a plan which has resulted in three-fifths of Dallas' Black pupils still attending virtually all-Black schools, and

b. The court-ordered plan leaves the primary grades (1-3) and high school grades (9-12) largely segregated by failing to attempt techniques of rezoning, pairing or transportation to achieve effective desegregation of those grades although such methods are used in Grades 4-8, and

c. The plan carves out a segregated "subdistrict" within the school system in the all-Black East Oak Cliff section of Dallas thus leaving all grades segregated in this area, and

d. The district court failed to make appropriate findings under *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971) and *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33, 37, (1971) to demonstrate that it had achieved "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation"

or that remaining one-race schools are "not the result of present or past discriminatory action" on the part of the school district.

2. The Brinegar group of petitioners and the Curry group of petitioners, intervenors below, have stated other questions including:

a. Whether the district court's 1971 finding of a constitutional violation, which the School District never appealed, was correct.

b. Whether certain all-White or integrated neighborhoods, e.g., North Dallas and East Dallas, should be exempted from the desegregation plan.

STATEMENT

I. Introduction and Summary of Proceedings.

This suit was commenced October 6, 1970, by respondents Tasby, et al., a group of Black and Mexican-American parents on behalf of 20 children attending pupil schools in the Dallas Independent School District (DISD), seeking an injunction requiring a comprehensive plan for the desegregation of the district. The complaint alleged that the DISD operated for years under a "*de jure* segregated attendance plan", that the current operation "basically continued the *de jure* segregation of its schools", and the defendants have "perpetuated the effects of the *de jure* tri-system and have not carried out their duty to dismantle the segregated school system 'root and branch' ". Complaint p. 6. The complaint alleged that the district's practices violated the Fourteenth Amendment and the civil rights statutes[1] and invoked the civil rights and federal question jurisdiction of the United States District Court for the Northern District of Texas.[2]

The DISD had been sued in a prior case brought in 1955 to desegregate the district. See Opinions Below Part II, *supra*. That case ended with a 1965 order requiring a desegregation plan based on attendance area pupil assignments which was to be effective in all grade levels by September 1967.[3] The prior litigation is briefly summarized in the Fifth Circuit's 1975 decision in this case. *Tasby* v. *Estes*, 517 F.2d 92, 95 (5th Cir. 1975). It required seven appeals to the Fifth Circuit for the plaintiffs in that case to obtain an order for a stair-step plan to eliminate segregation under an overt dual system. The opinions in the case by the late District Judge T. Whitfield Davidson are remarkable for their frank espousal of a philosophy of white supremacy and "racial purity" and their praise of slavery. See e.g., *Borders* v. *Rippy*, 184 F.Supp. 402, 405-409, 415-416 (N.D. Tex. 1960); *Borders* v.

[1] The complaint also invoked the Thirteenth Amendment and 42 U.S.C. sections 1981, 1983 and 2000d.

[2] Jurisdiction was alleged under 28 U.S.C. §§1331, 1343(3) and (4); 42 U.S.C. §§1981, 1983, 1988, 2000c-8 and 2000d. See Complaint p. 1 and First Amended Complaint.

[3] There were no proceedings in the case following the 1965 Order. See discussion, *infra* pp. 12-13.

Rippy, 188 F.S. pp. 231 (N.D. Tex. 1960); *Borders* v. *Rippy*, 195 F.Supp. 732 (N.D. Tex. 1961).

When the *Tasby* case was filed the DISD initially defended on the ground that it was in compliance with the constitutional requirements by virtue of having obeyed Judge Davidson's 1965 order. After a trial limited to the issue of whether or not the DISD was in compliance the district court on July 16, 1971 issued an opinion finding that extensive segregation of Black and White students continued and that "elements of a dual system still remain". 342 F.Supp. at 947. This finding of violation has never been appealed by the DISD which did file an appeal on remedy issues. It was challenged on appeal by the Curry intervenors, a group of White parents from North Dallas, who were granted leave to intervene on July 22, 1971, after the completion of the trial on the violation issue and the filing of the court's opinion. The DISD has, however, sought to minimize the extent of the violation which existed and the extent of the trial court's findings. A more detailed description of the evidence and findings on the violation is set forth in part II of this statement below.

After finding a constitutional violation the district court heard evidence on desegregation plans proposed by the plaintiffs and defendants. The plaintiffs offered a plan prepared by a team of experts from the Texas Educational Desegregation Technical Assistance Center (TEDTAC). This plan would have desegregated every school in the District by rezoning secondary

schools, and by pairing and grouping attendance zones at the elementary level. On August 2, 1971 the court ordered a limited desegregation plan. The Order provided for only *televised integration* at the elementary school level, approving the DISD's elaborate ten million dollar proposal for Black and White children to participate in simultaneous instruction by two-way television connections between their segregated schools for a few hours each week. The plan also provided for one weekly visit or joint activity of Black and White pupils. The television plan was promptly stayed by the Fifth Circuit at the request of the plaintiffs and was never implemented. At the secondary level, the district judge ordered some busing of Black students to formerly White schools in certain neighborhoods located closest to the Black ghetto in South Dallas. Initially in the August 2nd order the district court ordered a more extensive high school desegregation plan with a pairing arrangement. But following "a public furor"—to use the Fifth Circuit's phrase (517 F.2d at 100)—the district court on August 9, 1971 stayed the high school plan on its own motion. That high school plan was subsequently abandoned by the district court in favor of a DISD proposal involving the satelliting of a small number of Black pupils to formerly White schools and the zoning of small numbers of Whites into all-Black schools.

Cross appeals by the parties were orally argued in the Fifth Circuit on December 2, 1971, but the case was not decided by that court until July 23, 1975,

about 4 years after the district court's judgment. Thus at the elementary school level there was no desegregation except that obtained under Judge Davidson's 1965 order. Desegregation in secondary grades was quite limited and in accordance with the DISD's own proposal.

On July 23, 1975 the Fifth Circuit reversed the judgment insofar as it approved the desegregation plan, and ordered the formulation of a new student assignment plan. 517 F.2d 92. The court found the television plan insufficient because it "does not attempt to alter the racial characteristics of the DISD's elementary schools". 517 F.2d at 104. The appellate court rejected the high school plan because it found that the DISD had attempted only the limited objective of reducing the proportionate share of any racial group's population in a high school to a point just below the 90% mark so that the school would not be categorized as a "one race" school. The court of appeals rejected the idea that the 90% mark was a "magic level" of compliance and said the plan fell short of "a *bona fide* effort to comply with the mandates of the Supreme Court". 517 F.2d at 104. The Fifth Circuit rejected the Curry intervenors' argument that their North Dallas area should be insulated from the plan because it was a newly developed community. 517 F.2d at 108.

On remand, the district court considered six desegregation plans presented by the parties and amici. Four of the six plans included detailed pupil assign-

ment arrangements and projections. They differed considerably in the extent of desegregation proposed. Plaintiffs' expert witness Dr. Willie compared the DISD plan with the plaintiffs' two plans, and a plan designed by Dr. Josiah Hall, the court appointed expert. Using a rule of thumb that labeled schools still segregated if their Anglo or minority populations exceeded 70%, Dr. Willie's comparison of the four plans was as follows:

	DISD	Dr. Hall	Pl's Plan A	Pl's Plan B
Segregated Elementary	98	69	2	23
Segregated Junior Highs	13	8	0	4
Segregated Senior Highs	11	5	1	1
	122	82	3	28

Plaintiffs' Exhibit 14.

The plans filed by the Dallas NAACP and by the Educational Task Force of the Dallas Alliance contained general outlines of pupil assignment patterns. The NAACP plan contemplated that all schools would more or less reflect the district wide Anglo-minority ration with a 10% variance up or down. The Dallas Alliance plan provided the concepts which the court eventually adopted. The proposal left the assignments in the lowest grades (K-3) and the high school grades (9-12) virtually unchanged. Desegregation at those levels was limited to voluntary transfers. The concept provided for a desegregated pattern in grades 4-6 in

one set of schools and 7-8 in other schools using transportation and satellite zoning. The plan created an all-Black subdistrict in the East Oak Cliff section in which there would be no desegregated schools.

The court approved the Dallas Alliance concept and ordered the DISD to plan the assignment details, which were eventually incorporated in the Final Order entered April 7, 1976. The plan left over 27,000 pupils in 26 all-Black schools in the East Oak Cliff subdistrict, plus more than 40 one-race schools in the other subdistricts. See Appendix A to Final Order; Pet. App. No. 78-253, 84a *et seq.* On April 21, 1978 the Fifth Circuit in a unanimous opinion by Judge Tjoflat, joined by Judges Coleman and Fay remanded the case for a new plan and further findings. 572 F.2d 1010. The court found that a large number of one-race schools remained and that there had been no findings as to the feasibility of achieving more integration by using the desegregation techniques approved in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Fifth Circuit was particularly critical of the plan's failure to further desegregate the high schools, because the pupils in grades 4-8 in some areas were integrated in those grades and then segregated again in grades 9-12. The court ordered evaluation of the feasibility of applying the techniques which desegregated grades 4-8 to grades 9-12 in the same areas. 572 F.2d at 1014-1015.

As matters now stand Dallas high schools are still operated on substantially the same basis ordered by

Judge Davidson in 1965, except for limited changes made by the DISD plan in 1971. The high school plan which the Fifth Circuit rejected in the first appeal was not substantially improved on remand and was accordingly rejected again on the second appeal. Generally speaking, pupils in grades K-3 are also still assigned on the basis of the "neighborhood" zones developed by the Board under the 1965 court order.

II. The 1971 Proceedings on the Issue of the Constitutional Violation.

The Texas Constitution and statutes required school segregation in Dallas both before and after *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Texas Constitution Art. 7, §7 (1876) (repealed Aug. 5, 1969). See *Bell* v. *Rippy*, 146 F.Supp. 485, 487 (N.D. Tex. 1956); *Borders* v. *Rippy*, 247 F.2d 268, 272, note 1 (5th Cir. 1957). See also *Tasby* v. *Estes*, 412 F.Supp. 1185, 1189 (N.D. Tex. 1975). The array of Texas school segregation laws listed below was not repealed until 1969, fifteen years after *Brown, supra.*[4]

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[4] Texas statutes mandating school segregation enacted in 1905, 1911, 1915, 1923 and 1957 were repealed in 1969:

1. Tex. Rev. Civ. Stat. Ann., art. 2691 (Vernon 1965) enacted in 1905, provided for separate teachers' meetings for white and colored teachers. Repealed by Acts 1969, 61st Leg., p. 3024, ch. 889, § 2, effective Sept. 1, 1969.

2. Tex. Rev. Civ. Stat. Ann., art. 2695 (Vernon 1965) enacted in 1905, provided for consolidation of small school districts by race. Repealed by Acts 1969, 61st Leg., p. 3024, ch. 889, § 2, effective Sept. 1, 1969.

Desegregation of the Dallas public schools finally began at the first grade level in September 1961 (1971

3. Tex. Rev. Civ. Stat. Ann., art. 2719 (Vernon 1965) enacted in 1923, provided for a free public segregated school system. Repealed by Acts. 1969, 61st Leg., p. 3024, ch. 889, § 2, effective Sept. 1, 1969.

4. Tex. Rev. Civ. Stat. Ann., art. 2755 (Vernon 1965) enacted in 1905, provided that schools constructed with any funds voluntarily given by one race for a school for that race could not be used by another race without the consent of the district trustees. Repealed by Acts of 1969, 61st Leg., p. 3024, ch. 889 § 2, effective Sept. 1, 1969.

5. Tex. Rev. Civ. Stat. Ann., art. 2816 (Vernon 1965) enacted in 1905, provided for taking the school census by "color" of the parent or guardian of the child. Repealed by Acts 1969, 61st Leg., p. 3024, ch. 889, § 2, effective Sept. 1, 1969.

6. Tex. Rev. Civ. Stat. Ann., art. 2817 (Vernon 1965), enacted in 1905, provided for the separation of school census forms by race. Repealed by Acts 1969, 61st Leg., p. 179, ch. 75, §4, effective Sept. 1, 1969; Acts 1969, 61st Leg., p. 3024, ch. 889, § 2, effective Sept. 1, 1969.

7. Tex. Rev. Civ. Stat. Ann., art. 2819 (Vernon 1965) enacted in 1911, provided that the county superintendent make separate census rolls by race. Repealed by Acts 1969, 61st Leg., p. 3024, ch. 889, § 2, effective Sept. 1, 1969.

8. Tex. Rev. Civ. Stat. Ann., art. 2893 (Vernon 1965) enacted in 1915, provided that any child who lived more than two and one-half miles from a public school for children of his same race was not required to attend school. Repealed by Acts 1969, 61st Leg., p. 3024, ch. 889, § 2, effective Sept. 1, *1969*.

9. Tex. Rev. Civ. Stat. Ann., art. 2900 (Vernon 1965) enacted in 1905, provided that no child could attend a public school supported by public funds for another race. Repealed by Acts 1969, 61st Leg., p. 361, ch 129, § 1, effective Sept. 1, 1969; Acts 1969, 61st Leg., p. 3024, ch. 889 § 2, effective Sept. 1, 1969.

Tr. 436),[5] when the Fifth Circuit reversed one of Judge Davidson's orders which endorsed a three-way system of white, black and integrated schools. The Fifth Circuit approved the DISD's proposal for a grade-a-year desegregation plan.[6] Superintendent Estes testified that the DISD converted from a dual set of school zones for Black and White pupils to single zones on a grade-a-year basis until 1965 when the schedule was accelerated to include all six elementary grades and Grade 12. 1971 Tr. 435-436; 1971 Defendants Exhibit 4.[7] The DISD eliminated the dual zones for Junior

10. Tex. Rev. Civ. Stat. Ann., art. 2900a (Vernon 1965) enacted in 1957, provided that dual public school systems could not be abolished except by election of the voters in the school district, that school districts which maintained integrated schools for the 1956-57 school year be permitted to continue unless abolished, and that school districts and persons violating these provisions be subjected to penalty. Repealed by Acts 1969, 61st Leg., p. 1669, ch. 532, § 2, effective June 10, 1969; Acts 1969, 61st Leg., p. 3024, ch. 889, § 2, effective Sept. 1, 1969.

11. Tex. Rev. Civ. Stat. Ann., art. 3901a (Vernon 1965) enacted in 1957, provided, *inter alia*, that no child should be compelled to attend school with children of another race. Repealed by Acts 1969, 61st Leg., p. 3024, ch. 889, § 2, effective Sept. 1, 1969.

[5] The 5 volume transcript of the 1971 hearings is cited herein as "1971 Tr.". Volumes 1 and 2, pages 1-663 contain the hearing on the violation question. Volumes 3-5, pages 664-1435 are the 1971 remedy hearing.

[6] *Boson* v. *Rippy*, 285 F.2d 43 (5th Cir. 1960). The Fifth Circuit did not approve the 12 year delay but remanded for further proceedings on the timing. 285 F.2d at 47. See *Borders* v. *Rippy*, 195 F.Supp. 732 (N.D. Tex. 1961).

[7] The acceleration of the plan was the result of two more appeals by plaintiffs. In September 1964 Judge Davidson denied

High schools in 1966 and for the final two grades (10 and 11) in September 1967. 1971 Tr. 437. The 1965 resolution gave the Superintendent complete discretion to "prepare rules and regulations and establish the boundaries of districts, in order to implement and carry out the purpose and intent of this Resolution." Def. 1971 Exhibit 4. The resolution provided that schools "shall be racially desegregated" and that "single attendance districts shall be established" at the various grade levels, and it provided for transfers without regard to race. *Ibid.* The resolution and court order contained no other details about the manner in which desegregation was to be accomplished. Thus the 1965 court orders did not prescribe the manner of desegregation beyond specifying the grades to be included, and there was no review of the DISD's compliance or other proceeding in that case after 1965.

plaintiffs' motion to accelerate the 12 year plan. While plaintiffs' appeal was pending the Fifth Circuit held in other cases that 12 year plans could no longer pass muster. *Lockett* v. *Board of Education of Muscogee County*, 342 F.2d 225 (5th Cir. 1965) (February 24, 1965); *Bivins* v. *Board of Public Ed.*, 342 F.2d 229 (5th Cir. 1965) (February 25, 1965); *Singleton* v. *Jackson Mun. Sep. School Dist.*, 348 F.2d 729 (5th Cir. 1965) (June 22, 1965). The day after *Singleton, supra*, the DISD passed a resolution to establish single attendance zones for all elementary schools in September 1965, for Junior High schools in 1966, and for High Schools in 1967. See this resolution in the Tasby record as 1971-Defendants Exhibit 1. When the Fifth Circuit was advised of the resolution it vacated and remanded relying on the board's good faith. *Britton* v. *Folsom*, 348 F.2d 158 (5th Cir. 1965). It also ordered the desegregation of grade 12, but despite that clear direction Judge Davidson refused to order grade 12 desegregated and plaintiffs appealed again. On September 1, 1965, the Fifth Circuit again ruled that grade 12 must be desegregated immediately. *Britton* v. *Folsom*, 350 F.2d 1022 (5th Cir. 1965). See 1971 Defendants Exhibits 2, 3, and 4.

Superintendent Estes testified that attendance areas were designated on the basis of such criteria as building capacities, distance to schools, geographical barriers, traffic arteries, projected enrollment and continuity in curriculum. 1971 Tr. 590-592. He stated that "We have not considered race in the construction of attendance zones in this district." 1971 Tr. 527; see also 589.

The earliest year for which school-by-school racial enrollment data is available in the record is 1966-67.[8] Racial segregation was very evident at that time. In 1966-67 there were 33 90-100% Black schools. Three-fourths of all Black pupils (33,850 out of 43,816 or 77.26%) attended these 33 virtually all-Black schools in 1966-67. There were 114 schools which had less

[8] The 1966-67 figures are on the last two pages of Appendix 4 of the DISD answers to plaintiffs' first set of interrogatories. The answers were admitted into evidence at 1971 Tr. 6-11. The Board answered that it did not have racial enrollment data available for earlier years. Before and during the trial Judge Taylor declined to require the Board to answer plaintiffs' interrogatories seeking racial enrollment data, school assignment maps and other materials for years prior to 1965. See Transcript of hearing on discovery matters June 8, 1971, pp. 1-15; see also 1971 Tr. 660. In so ruling Judge Taylor said " . . . I want to know what the situation is now, in the light of the development on the law and what the School District is doing now, and has done since '65. I don't think it's necessary to—if you want me to, I will say that it's pretty obvious to the Court that there must have been *de jure* segregation or segregation prior to the Court order of '65." June 8, 1971, Tr. 15.

than 10% Black pupils and enrolled nine-tenths of the Anglos and Hispanics (107,173 out of 118,079 or 90.76%). The 1966-67 enrollment data is summarized below in a table which shows the number of schools and pupils in each percentage range. Anglos, Hispanics and "others" are combined in the Board's figures for 1966-67. The table indicates the racial separation of Black pupils during 1966-67:

1966-67

Percentage of Anglo, Hispanic & Other Students	No. of Schools	Anglo, Hispanic & Other Students No.	%	Black Students No.	%
90-100	114	107,173	90.76	560	1.28
80-89	6	3,882	3.29	770	1.76
70-79	5	2,386	2.02	856	1.95
60-69	4	1,528	1.29	789	1.8
50-59	1	447	.38	442	1.01
40-49	1	278	.24	302	.69
30-39	2	547	.46	1,095	2.5
20-29	1	404	.34	1,045	2.38
10-19	4	832	.71	4,107	9.37
1-9	10	578	.49	11,241	25.66
Less than 1%	23	24	.02	22,609	51.6
Total	171	118,079	100	43,816	100
% of Total		72.94		27.06	

Source: This table was derived from the data in defendants' Answers to Interrogatories (first set) Appendix 4 (last two pages).

It is possible to identify the names of the all-Black schools in Dallas in the early 1960's despite the absence of detailed enrollment data, because faculties were segregated and the all-Black faculties are in the record.[9] The faculty figures identify 37 all-Black schools in the pre-1965 period. There were 28 all-Black faculties in 1960-61, three new schools were opened in the early 1960's with Black faculties, and the DISD converted six all-White faculties to all-Black in the 1962-64 period.[10]

[9] Defendants' Answers to Interrogatories (first set), No. 1(d).

[10] Twenty-eight schools with all-Black faculties in 1960-61 were: Lincoln H.S., Madison H.S., B.T. Washington H.S., Sequoyah Jr. H.S., Arlington Park, J.H. Brown, Carr, Carver, Colonial, Darrell, Douglass, Dunbar, Crispus Attucks, Eagle Ford (Black), Ervin, Frazier, Harllee, Harris, Hassell, Johnston, Polk, Ray, Rice, Roberts, Thompson, Tyler, Wheatley, and Starks. Three schools opened in the period with all-Black faculties were Ervin Jr. H.S., Pinkston H.S., Roosevelt H.S. Six schools converted from all-White to all-Black faculties were Holmes Jr. H.S., Zumwalt Jr. H.S., Pease, Stone, Miller, and Mills. Answers to Interrogatory 1(d).

The conversions from all-White to all-Black faculties were:

Schools	Years	White Teachers	Black Teachers
Holmes	1963-64	26	0
	1964-65	0	50
Zumwalt	1964-65	42	0
	1965-66	0	33
Pease	1963-64	12	0
	1964-65	0	24
Stone	1963-64	17	0
	1964-65	0	17
Miller	1962-63	20	0
	1963-64	0	26
Mills	1961-62	15	0
	1962-63	0	24

Ibid.

During the period from 1965 to the trial in 1971 the DISD built at least 15 schools which were either all-White or all-minority by the time of the trial, and five others were opened as such shortly thereafter.[11] Respondents Tasby et al. and the NAACP took four appeals to the Fifth Circuit complaining of the district court's refusal to enjoin the DISD from building a series of new one-race schools. Dr. Estes testified "The policy of the District has been during the pre-*Swan[n]* era not to consider race in the construction of school facilities." 1971 Tr. 527-28. The Fifth Circuit twice remanded and held in 1975 that the district court had erred in not granting plaintiffs some relief against the continued building of new one-race schools. *Tasby* v. *Estes*, 444 F.2d 124 (5th Cir. 1971); *Tasby* v. *Estes*, 517 F.2d 92, 104-106, 110 (5th Cir. 1975). In 1978 the Fifth Circuit approved a site acquisition complained of by the NAACP, but ordered the district to study the feasibility of sending White pupils to the school which had been planned as another all-Black facility. *Tasby* v. *Estes*, 572 F.2d 1010,

[11] All-White schools opened between 1965 and the trial were Carter, Skyline, Hulcey, Alexander, Cochran, Conner, Gooch, Nathan Adams, Rowe, Runyon, Turner. Minority schools were Arlington Park, Darrell, Marshall, Edison, Seguin, Tyler, Navarro, Jackson and Young. Pl. 1971 Exhibit 3; 1971 Tr. 494-500. Another fourteen one-race facilities benefited from construction additions between 1965 and 1971. Of further note is the fact that the five new facilities opened post-1971 were the subject of objection by plaintiffs prior to their completion. Despite plaintiffs' unsuccessful attempts to enjoin this construction the DISD opened each as a one-race facility.

1016-1018 (5th Cir. 1978). Nevertheless, since the 1978 Fifth Circuit decision, the 1979 DISD report to the court shows that two new virtually all-Black high schools have been opened in the disputed shopping center, e.g., A. Maceo Smith High School 97.64% Black and East Oak Cliff Alternative School 99.21% Black.

The DISD did not adopt a racial majority-to-minority transfer plan until the eve of the 1971 liability trial, and it was not announced until the trial. 1971 Tr. 560-563, 645-647. Prior to the 1971 trial pupils were required to remain in their attendance area schools and there was no "freedom of transfers" policy except for certain transfers for "curriculum enrichment". 1971 Tr. 561.

Despite the 1965 order, pupil segregation was still extensive in 1970-71 the year this suit was filed. In that year there were about 181 schools enrolling 165,694 pupils who were 94,354 Anglos (56.94%), 56,621 Blacks (34.17%), 13,948 Mexican Americans (8.42%) and 771 Asians, American Indians and others (.47%). A full nine-tenths of the Black students attended 48 schools which were less than 10% White; sixty-three percent of them were in 36 schools which had less than 1 percent Anglo pupils. More than two-thirds of the Anglos were concentrated in 69 over 90% Anglo schools. The following table gives a detailed analysis of the 1970-71 enrollments and depicts the great extent of segregation:

1970 - 71

Percentage Of White Students	No. of Schools	White Students No.	%	Black Students No.	%	Hispanic Students No.	%	Other Students No.	%
90-100	69	64,995	68.88	242	.43	1,991	14.27	253	32.81
80-89	21	16,466	17.45	516	.91	2,051	14.7	179	23.22
70-79	15	6,555	6.95	442	.78	1,439	10.32	93	12.06
60-69	8	2,252	2.39	218	.39	976	7.0	82	10.64
50-59	1	215	.23	107	.19	40	.29	2	.26
40-49	7	1,609	1.7	529	.93	1,365	9.79	58	7.52
30-39	1	79	.08	9	.01	144	1.03	6	.78
20-29	5	983	1.04	1,181	2.09	1,657	11.88	25	3.24
10-19	6	650	.69	2,416	4.27	1,552	11.13	28	3.63
1-9	12	439	.47	14,859	26.24	1,696	12.16	34	4.41
Less than 1%	36	111	.12	36,102	63.76	1,037	7.43	11	1.43
TOTAL	181	94,354	100	56,621	100	13,948	100	771	100
% Of Total		56.94		34.17		8.42		.47	

Source: This table was derived from the data in Defendants' Answers to Interrogatories (First Set) Appendix 1. (See also Plaintiffs' 1971 Exhibits 1, 2.)

The net effect of the board's policies between 1965 and 1970 was to increase the extent of segregation of Black pupils during the years when desegregation was supposedly being implemented. The 1972 Mondale Committee Report found that the percentage of Dallas Blacks in 90-100% Black schools was 82.6% in 1965, 87.6% in 1968 and 91.4% in 1971.[12]

In 1970-71 the DISD had 7,293 teachers: 1,856 were Black, 73 were Chicano and 5,364 were Anglo. Plaintiffs' 1971 Exhibit 4. Plaintiffs established at the 1971 trial that there had been relatively little progress in faculty desegregation in the DISD. Plaintiffs' 1971 Exhibit 4 listed the many one-race schools with virtually one-race faculties. This exhibit established that of 1,865 Black teachers in the DISD, 1,694 or 88.8% taught in schools with 90% or greater racial minority students, and only 88 Black teachers or 4.7% were in schools with 90% or greater white enrollments.[13] Su-

[12] Report of the Select Committee on Equal Educational Opportunity, 92nd Cong., 2d Sess. Senate Report No. 92-100; December 31, 1972, Table 7-16, p. 117. The 1968 and 1971 figures in the Senate Report are consistent with exhibits in the record. (See Defendants' Answers to Interrogatories (first set) Appendices 1 and 3). The record does not contain racial enrollment data by school for 1965. (See note 8, *supra*).

[13] We have now subjected the student and faculty enrollment figures in the Defendants' Answers to Interrogatories, first set, to a more detailed analysis and calculated the correlation between the percentages of black students and teachers in each school in the system in 1970-71. The calculations yield a coefficient of correlation (r) of .91, and a coefficient of determination (r^2) of .83. The coefficient of determination indicates that the racial composition of the students accounts for or is associated

perintendent Estes testified that in 1968-69 the DISD began a phased faculty desegregation program, by assigning more than one ethnic group to the faculties of 20 of the 182 schools. 1971 Tr. 455. In 1969-70 the system had "over forty" faculties "with more that one ethnic group represented". *Id.* at 455. In 1970-71 Dr. Estes said "we had all of our twenty-one high schools, twenty-three junior highs, and over sixty percent of our elementary schools that had more than one ethnic group represented on their faculty." *Id.* at 455-456. After the start of the 1971 trial the DISD announced for the first time its plan to desegregate the faculties of all schools in accordance with the Fifth Circuit's *Singleton* decision. 1971 Tr. 456, 647-652. See *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969). Dr. Estes also indicated an awareness of this Court's *Montgomery* decision on faculty desegregation (1971 Tr. 650) (*United States* v. *Montgomery County Board of Ed.*, 395 U.S. 225 (1969)), but said that the Board had not decided to adopt a *Singleton* plan until after the *Swann* decision. 1971 Tr. 651. Of course, this Court's first faculty desegregation decisions had been made six years earlier. *Bradley* v. *School Board*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965).

Dr. Estes testified that 19 schools had changed from White to predominantly Black between 1965 and

with about 83% of the variation in faculty racial compositions. See J. Freund, *Modern Elementary Statistics* 421-22 (4th ed. 1973).

the 1971 trial, and that these changes were due to changing neighborhood racial patterns, primarily in the South Oak Cliff area of Dallas during these years. 1971 Tr. 514-422. Dr. Estes said that 1 High School, 3 Junior High schools and 15 elementary schools changed from White to Black during the 1965-1971 period.[14] The district court stated in its opinion on the violation issue that "[t]he School Board has asserted that some of the all Black schools have come about as a result of changes in the neighborhood patterns but this fails to account for the many others that remain as segregated schools." *Tasby* v. *Estes*, 342 F.Supp. 945, 947 (N.D. Tex. 1971).

The validity of the court's finding is easily demonstrated by observing that 31 schools which had all-Black faculties in the early 1960's had 90% or more Black pupils at the time of the 1971 trial.[15] Indeed in 1979, 30 of the pre-1965 all-Black schools remain over

[14] The schools named by Dr. Estes were South Oak Cliff High, Holmes Jr. High, Boude Storey Jr. High, Zumwalt Jr. High, and Pease, Bushman, Stone, Bryan, Lisbon, Thornton, Budd, Russell, Oliver, Marsalis, Earhart, Juarez, Lanier, City Park, and Roberts elementary schools. (At one point Dr. Estes said there were 16 such schools but only 15 elementary schools were named). 1971 Tr. 514-522.

[15] Of the 37 pre-1965 all-Black schools which we have been able to identify by their faculties in note 10 *supra*, 31 of them had over 90% Black pupils in 1970-71, 3 were between 82 and 98% Black and Mexican-American combined, and 3 were no longer open. Compare Answers to Interrogatories (first set), Answer to Int. 1(d) with Appendix 1 of the same answers.

90% Black.[16] Similarly, if one compares the list of all-Black schools in 1966-67 with the current list of all-Black schools in the Board's April 1979 report to the district court, it is evident that most of the 1966 Black schools have not been desegregated. Twenty-eight schools which were virtually all-Black in 1966-67 are still all-Black in 1979; the 28 schools listed in the note below were 90 to 100% Black in both 1966 and 1979.[17] There were five other all-Black schools in

[16] Compare list of schools in note 10, *supra* from Board's Answer to Interrogatory 1(d) with April 15, 1979 report by DISD to the District Court. Of the 36 schools listed in note 10, *supra* all are 90% or more Black in 1979 with the following exceptions: Polk—83.05% Black, Sequoyah—47.65% Black, B.T. Washington (now Arts Magnet school)—47.65% Black. The remaining exceptions are schools which have been closed since 1965, e.g., Attucks, Eagle Ford (Black) and Starks. Zumwalt Jr. H. building was designated under the Court-ordered plan to be used as part of the all-Black S. Oak Cliff H.S. The B.T. Washington H.S. was closed from 1969 until reopened in 1976 as the Arts Magnet high school.

[17] *Schools under 10% White in 1966 and 1979:*

Less than 1% White in 1966-67

Lincoln H.S., F.D. Roosevelt H.S., James Madison, H.S., J.N. Ervin Middle School, Arlington Park Comm. Lrn. Center, John Henry Brown Elem. Sch., Colonial Elem. Sch., B.F. Darrell Comm. Lrn. Center, Paul L. Dunbar Elem. Sch., J.N. Ervin Elem. Sch., Julia C. Frazier Elem. Sch., Fannie C. Harris Elem. Sch., Thomas C. Hassell Elem. Sch., J.W. Ray Elem. Sch., Chas. Rice Elem. Sch., H.S. Thompson Elem. Sch., Priscilla L. Tyler Comm. Lrn. Center, Phyllis Wheatley Elem. Sch.

1-9% White in 1966-67

O.W. Holmes Middle Sch., J.N. Bryan Elem. Sch., C.F. Carr Elem. Sch., G.W. Carver Elem. Sch., N.W. Harllee Elem. Sch., Albert S. Johnston Elem. Sch., Roger Q. Mills Elem. Sch., Alisha

1966-67.[18] Seven of the all-White schools of 1966 remain over 90% White, and another eight are 80-100% White in 1979.[19]

The Curry intervenors, who were allowed to intervene as defendants after the trial on the violation, argued that the desegregation remedy should not apply to their area of North Dallas because it had not been a part of the DISD at the time of the *Brown* decision. However, each of the schools in the area claimed by the Curry group was established as a one-race White school during the years of dual school

M. Pease Elem. Sch., Harry Stone Middle Sch., Sarah Zumwalt Jr. H.S. (now part of S. Oak Cliff H.S.)

[18] *Schools under 10% White 1966-67 but not in 1979*

P.C. Anderson Career Academy, K.B. Polk Elem. School, Booker T. Washington Elem. Sch. now Arts Magnet school), Winnetka Elem. Sch., Joseph J. Rhoads Elem. Sch.

[19] *Schools over 90% White in both 1966-67 & 1979*

W.T. White H.S., Wm. L. Cabell Elem. Sch., Tom C. Gooch Elem. Sch., Victor H. Hexter Elem. Sch., Arthur Kramer Elem. Sch., Richard Lagow Elem. Sch., Nancy Moseley Elem. Sch.

Schools over 90% White in 1966 & 80-90% White in 1979

Bryan Adams H.S., George B. Dealey Elem. Sch., Everette Lee Degolyer Elem. Sch., Chas. A. Gill Elem. Sch., Edwin J. Kiest Elem. Sch., B.H. Macon Elem. Sch., Urban Pk. Elem. Sch., Harry C. Withers Elem. Sch.

Note should be made that for elementary and middle schools, the overall school percentage for Anglo is the utilized measurement. In grades K-3 as of 1979, many more elementary schools will be 80% to over 90% Anglo.

operation. The schools all opened with all-White faculties:

School	Year Opened	Faculty (year)
N. Adams	1967	26 White - 1967
Cabell	1958	26 White, 1 Hisp. - 1960-61
Degolyer	1961	28 White - 1961
Gooch	1965	24 White - 1965
Marcus	1963	13 White - 1963
Withers	1961	28 White - 1961
Marsh Jr. H.S.	1962	37 White - 1962
W.T. White H.S.	1964	38 White - 1964

Answers to interrogatories (first set) 1(d).

Each of these schools had over 90% White pupils in the 1966-67 year, with the exception of Nathan Adams which opened the following year as an over 90% White school. Answers to Interrogatories (first set), Appendix 4 (last two pages). Gooch, Cabell and W.T. White H.S. remain over 90% White, and Degolyer and Withers are 80-89% White in 1979.

The district court's opinion of July 16, 1971 found that "elements of a dual system still remain", and that the DISD had been aware of, but had not complied with, Fifth Circuit decisions ordering various desegregation steps until after the case was filed.[20]

[20] The court wrote at 342 F.Supp. 945, 947-948:

When it appears as it clearly does for the evidence in this case that in the Dallas Independent School District 70 schools are 90% or more white (Anglo), 40 schools are 90% or more Black, and 49 schools are 90% or more minority, 91% of black students in 90% or more of the minority schools, 3% of the black students attend schools in which the majority is white or Anglo, it would be less than honest for me to say or to hold that all vestiges of a dual system have been eliminated in the Dallas Independent School District, and I find and hold that elements of a dual system still remain.

The School Board has asserted that some of the all-Black schools have come about as a result of changes in the neighborhood patterns but this fails to account for many others that remain as segregated schools. The defendant School Board has also defended on the ground that it is following a 1965 Court order. This position is untenable.

The *Green* and *Alexander* cases have been handed down by the Supreme Court since the 1965 order of the Court of Appeals for the Fifth Circuit to the Dallas Independent School District. There have been too many changes in the law even in the Fifth Circuit and it is fairly obvious to me that the defendant School Board and its administration have been as aware of them as I. For example, the case of *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 was handed down in December of 1969. This was the case in which the Court ordered, among other things, desegregation of faculty and other staff, majority to minority transfer policy, transportation, an order with reference to school construction and site selection, the appointment of bi-racial committees. The Dallas School Board has failed to implement any of these tools or to even suggest that it would consider such plans until long after the filing of this suit and in part after the commencement of this trial.

The court found that there was insufficient evidence to show there had been *de jure* segregation of Mexican-Americans in Dallas, but did find that Mexican-Americans were a distinct and clearly identifiable ethnic group, and ordered that any desegregation plan must take this fact into consideration.[21]

[21] The finding that Mexican-Americans were an identifiable minority group was made on the basis of considerable evidence

III. The 1971 Remedy Hearing; Desegregation Proposals.

A. Plaintiffs' Proposal—the TEDTAC Plan.

At the 1971 hearing plaintiffs endorsed a desegregation plan which would have effectively desegregated the entire DISD. The plan, called the TEDTAC plan (1971 Pl's. Exhibits 122, 123, 124, and 125), was the product of several months work by a team of 8 staff members of the Texas Educational Desegregation Technical Assistance Center, University of Texas at Austin. TEDTAC had previously worked on desegregation plans for 41 other school districts. 1971 Tr. 1016. TEDTAC began working on a Dallas plan following a request from Judge Taylor in October 1970. 1971 Tr. 966. The Project Administrator, Pete Williams, met with the Superintendent and all principals, and then teams of staff members visited every school in the district and collected data. 1971 Tr.967-970; 1029-1040. This was followed by a three month period of drawing and redrawing attendance lines to produce the final product. 1971 Tr. 969. Joe Price, the team captain, explained the plan in detail. 1971 Tr.986-1006; 1114-1117; 1150-1168.

The TEDTAC plan would have desegregated each high school in the city by redrawing attendance lines. The high school plan is 1971 Pl.Ex. 123; the proposed

offered by plaintiffs. See 1971 Tr. pp. 102-378; testimony of Richard Medrano, Dr. George I. Sanchez, Rene Martinez, Carlos Vela, Horacio Ulibarri, and Henry Ramirez.

new zone map follows page 20. The plan used elongated zones to assign minority pupils in the central and southern parts of the district and White pupils in the northern area to the same schools. The plan proposed White enrollments in the high schools which ranged from a high of 84% to a low of 40%. The highest projected Black percentage in any high school would have been 41%. (The district-wide ratios in 1970-71 were Anglo 56.94%, Black 34.17% and Mexican-American 8.42%.)

The Junior High proposal (Pl. 1971 Ex. 124) by TEDTAC was also a rezoning plan, based upon combinations of new proposed elementary zones. Each of the junior high schools would have been desegregated with the Anglo pupils ranging from a high of 81 to a low of 31%. *Ibid.* Black student percentages ranged from 15% to 48%. The proposed zone map is at Pl. 1971 Ex. 124 following p.20.

The elementary school plan (Pl. 1971 Ex.125) desegregated as many schools as possible by pairing or grouping contiguous school zones, and grouped the remaining schools on a non-contiguous basis. 1971 Tr. 999-1003. It was the view of the TEDTAC team that non-contiguous pairing was essential if all racially identifiable schools were to be desegregated. 1971 Tr.1184. White student percentages would range from 87% to 22%, and Black percentages from zero to 50%. Pl. 1971 Ex. 125.

TEDTAC estimated the transportation required by the elementary plan as 12,500 students in contiguous

zones and 21,600 in non-contiguous zones. 1971 Tr.1115. TEDTAC Administrator Pete Williams believe that it was not necessary to plan a bus transportation program for high school pupils, because few would actually use school buses. 1971 Tr. 983-985. He said that secondary students usually provide their own transportation and tend to think of school buses as something for younger children. *Ibid.* The DISD estimated that the TEDTAC plan would make 35,000 secondary pupils and a total of 70,000 pupils eligible for busing. 1971 Tr. 1313-1314; 1324-1327.

The TEDTAC staff used scaled maps to estimate the distances pupils would be required to travel under the plan. 1971 Tr. 1155-1160. Mr. Price testified to the longest distances in each non-contiguous group or pair; the contiguous pairs were all shorter distances. He estimated the distances in the non-contiguous pairs ranged from 7 to 18 miles. 1971 Tr. 1157-1160. Plaintiffs also presented illustrative travel time studies. Twilla Young drove from Arlington Park Elementary to White High School in both directions measuring 14.8 miles and 26 minutes in one direction and 15 miles in 24 minutes in the other direction. 1971 Tr. 1287-1293. She drove from Burnett Elementary to Darrell Elementary 23.9 miles and 35 minutes one way and 22.1 miles and 32 minutes in the other direction.

When the TEDTAC plan was finally presented in court it was not advocated by TEDTAC, but was merely presented as a feasible proposal. 1971 Tr.988.

Instead TEDTAC administrator Williams advocated his invention the television plan which, as modified, was urged by the DISD and eventually ordered by the court. However Mr. Williams did testify that the TEDTAC plan advocated by plaintiffs was "educationally sound, administratively feasible, and financially plausible."[22] 1971 Tr. 1185. Mr. Williams testified that in his opinion bus trips not in excess of 45 minutes one-way were acceptable, but that longer trips might interfere with the school day. 1971 Tr.1186-1187. One of his reasons for finally not advocating the plan was a fear that some of the trips might be longer than 45 minutes. 1971 Tr. 1233.[23]

Mr. Bryan Vinson, operator of a private bus company which transports private school children in Dallas, testified that he transports pupils from 10 minutes to an hour, and that the average ride of these private school children in Dallas was 45 minutes. 1971 Tr.1301-1303. Superintendent Estes testified that based on his experience working at H.E.W. he knew

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[22] Judge Taylor noted the abuse and criticism TEDTAC received for creating the proposal: "That agency has been harassed, intimidated, pressured and abused in many other ways, and it did not deserve this type of treatment. The politicians have made their speeches, have called their office demanding names, suggesting loss of employment sometimes subtly and sometimes not so subtly. Some of the staff of TEDTAC have been obliged to unlist their phone numbers in order to escape harassing telephone calls." 342 F.Supp. at 949.

[23] Mr. Williams also said he did not recommend the TEDTAC plan because he thought the community would react badly to the idea of buying a lot of buses. 1971 Tr. 1232-1233.

that about 39% of all pupils in the country were bused to school. 1971 Tr. 951-952. The DISD's own 1971 proposal for secondary schools included a few bus trips of an estimated 30 minutes. 1971 Tr. 852.

In the Memorandum Opinion of August 17, 1971 (342 F.Supp. 949), Judge Taylor declined to order the TEDTAC plan stating:

> The Court has concluded that to adopt the gerrymandering, pairing, and grouping plan submitted by Plaintiffs, accompanied by the massive crosstown bussing required to implement such a plan, would result in extensive "abrasions and dislocations" and a disruption of the educational process, and is rejected in the light of the teaching of Allen v. Board of Public Instruction of Broward County, 432 F2d 362 (5th Cir. 1970), to keep "such problems at a minimum".

342 F. Supp. at 950-95).

B. The DISD Plan and the Court-Ordered Plan.

The desegregation plan filed by the DISD July 23, 1971, (Def.1971 Ex.20) entitled "Confluence of Cultures" provided a student assignment plan for senior and junior high schools based upon rezoning with the use of a few satellite zones in Black neighborhoods from which pupils were bused to formerly White schools.[24] Supt. Estes explained the high school plan.

[24] In addition to the assignment plan the proposal provided for desegregation of faculty and staff, for a majority to minority transfer option, for a recognition by the district of an affirmative duty to use school location and abandonment to promote integration, and for a tri-ethnic committee. Def. 1971 Ex.20.

1971 Tr. 680-705. He testified the plan would eliminate every 90% or more White high school and all but one 90% or more Black high school. *Id.* at 680. The plan created three satellite zones in which Black pupils would be bused to White high schools, e.g., from the Ray school area to Hillcrest High (about 20-30 minutes) (*Id.* at 694), from Arlington Park area to White High school (350 students about 30 minutes) (*Id.* at 695) and from the Harris and Hassell areas to Bryan Adams. *Id.* at 698.

Dr. Estes explained that in drawing high school attendance zones the DISD had attempted to minimize the changes in zone lines:

> Q. The student assignment in the high schools for '71-72 under the School Board's plan. Now, you said yesterday in drawing this plan you, the Board had attempted to maintain the continuity and integrity of the high school zones. Now, what does that mean?
>
> A. That's correct.
>
> Q. What does that mean exactly?
>
> A. This means to maintain as nearly as possible the feeding schools associated with that particular high school so that the traditions, the customs, the localities that have been established, the articulation and coordination of the curriculum that has been developed over a period of

years, the communication between department heads, between classroom teachers and among the principals can be maintained so as to enhance the possibility of continued quality education.

Q. So for these reasons you have attempted to minimize the changes in the zone lines at the high school level?

A. Yes sir, that's correct.

1971 Tr. 842; Dr. Estes cross-examination by Mr. Surratt.

The effect of the rezoning with the limited objective of reducing one-race schools to a point just slightly under the 90% level was indicated by the projections in the DISD plan of ethnic composition for the 1971-72 year. For example Black schools such as Lincoln, Pinkston, and Roosevelt were projected at 88%, 88.2%, and 86.4% minority pupils respectively in the plan, and Anglo schools had similar minimal integration.[25]

The DISD plan's treatment of the junior high schools was similar to the high school plan. A few Black pupils were bused from satellite zones to White schools with the objective of reducing the number of 90% or more White schools from 10 to 1. The plan left four 90% or more minority schools (Edison, Holmes, Sequoyah, and Zumwalt) and another at a slightly

[25] For example, the DISD projections for Anglo percentages included Adams, Hillcrest, Jefferson, Kimball, Samuell, White and Wilson between 80 and 88% Anglo. Def. 1971 Ex.20.

lower level (Storey—85.2% minority). It had eleven White schools ranging from 79.4%—93.6% Anglo. 1971 Def. Ex. 20.

The secondary school plan finally ordered by the district court was basically the same as the DISD proposal just described. 517 F.2d at 100. Initially Judge Taylor rejected the plan and ordered more busing of Blacks from satellite zones and a high school pairing arrangement. Unreported Order of August 2, 1971. However a week later, after the pairing order had touched off public criticism, the district court "stayed" and ultimately abandoned this plan, stating that it was unfair and unreasonable. 342 F.Supp. at 951; see 517 F.2d at 100. The district court then obtained a secondary plan from the DISD that was virtually identical with the original plan and approved it in an *ex parte* proceeding. 517 F.2d at 100.

The DISD's television desegregation plan for elementary schools did not change the pupil assignments. The DISD's own statistical summary of its plan indicated that it would not eliminate any racially identifiable elementary schools. Indeed the number would be increased by the opening of 4 new Black schools:

ELEMENTARY SCHOOL
STATISTICAL SUMMARY
RACIALLY IDENTIFIABLE SCHOOLS

	1970-71	1971-72
Populated by student bodies 90% or greater White	50	50
Populated by student bodies 90% or greater Black	32	36*
Populated by student bodies 90% or greater minority	37	41*

*Additional elementary schools for 1971-72
Pearl C. Anderson
James Madison
Jose Navarro
Erasmo Seguin

Def. 1971 Ex. 20.

The district court ordered implementation of the television plan on a basis somewhat different from that proposed by the DISD. 342 F.Supp. at 952. The court provided for two-way audio and visual contact between the Anglo and minority classrooms, and also ordered that classes be paired for television purposes on a 2-1 Anglo-minority ratio. The board's proposal would have had only one-way video communication, and would have left 10 Black schools in Oak Cliff without even a television pairing with Anglo schools. DISD 1971 Ex. 20; 1971 Tr. 890. Dr. Estes testified that the DISD was prepared to spend 10 million dollars to implement the television plan. 1971 Tr. 729.

As previously indicated, in 1975 the Fifth Circuit reversed both the elementary and secondary plans ordered in 1971 and remanded the case for a new hearing. 517 F.2d 92. The court of appeals stayed the

television plan pending appeal. Thus elementary school pupils in Dallas remained assigned to "neighborhood schools" under DISD zones adopted before the case until a new plan was implemented in September 1976 after the second remedy hearing which is described below. Actual desegregation under the 1971 order was limited to the secondary level.

The results of the 1971 order after four years of implementation are indicated by the December 1975 school enrollments contained in the DISD answers to interrogatories by the Strom intervenors. Strom Ex. 1. In December 1975 71.27% of Black pupils (44,736 of 62,711) attended 58 schools with less than 10% Anglo pupils. There were 23 schools with zero White pupils and 13,289 Blacks, and 7 schools with only 1 White student each and 7,416 Blacks. The full extent of the racial isolation is shown by the following table:

December 1975

Percentage of White Students	No. of Schools	White No.	White Students %	Black No.	Black Students %	Hispanic No.	Hispanic Students %	Other No.	Other Students %
90-100	20	9,546	16.41	175	.28	405	2.14	130	8.99
80-89	30	19,802	34.04	1,857	2.96	1,440	7.6	357	24.71
70-79	8	3,266	5.06	1,094	1.74	660	3.48	80	5.54
60-69	11	3,797	10.84	3,860	6.15	1,370	6.49	206	14.26
50-59	14	5,789	9.95	1,354	2.16	3,413	18.06	164	11.35
40-49	8	2,410	4.14	1,442	2.29	1,405	7.42	96	6.76
30-39	10	2,159	3.71	2,091	3.33	1,770	9.34	92	6.37
20-29	8	1,718	2.95	3,669	4.89	1,642	8.67	117	8.1
10-19	10	1,189	2.04	5,093	8.98	3,209	16.94	83	5.74
1-9	15	442	.76	8,766	13.97	3,236	17.09	107	7.4
Less than 1%	44	56	.1	35,970	57.3	391	2.06	11	.76
Total	178	58,176	100	62,771	100	18,943	99.99	1,445	100
% of Total		41.16		44.41		13.4		1.02	

Source: This table is derived from data in Strom Exhibit 1 (DISD answers to Strom interrogatories).

IV. The 1976 Remedy Hearing.

A. The DISD Plan, the Hall Plan, Plaintiffs' Plans A & B, the NAACP Plan.

At the 1976 remedy hearing six desegregation plans were presented. Four plans contained pupil assignment proposals in sufficient detail to determine the impact on each one-race school. The greatest amount of desegregation would have been achieved by plaintiffs' Plan A. Plan B achieved somewhat less desegregation, and Dr. Hall's Plan and the DISD Plan achieved even less. The NAACP Plan which proposed desegregation of every school and the Dallas Alliance Plan were the other proposals submitted at the hearing. The latter plans were pupil assignment concepts without completely detailed pupil assignment schemes. The analysis of the plans in the district court's opinion describes their assignment techniques in some detail, but fails to state the extent of desegregation each plan was designed to achieve. 412 F.Supp. at 1199-1203.

The DISD Plan (Def. Ex. 12) described in the district court opinion (412 F.Supp. at 1199-1200), indicates that as of December 1, 1975 the district enrolled 141,122 pupils of whom 58,023 (41.1%) were Anglo, 62,767 (44.5%) were Black, 18,889 (13.4%) were Mexican-American, and 1,443 (1%) were listed as "other". Tr. Vol. 1. 60-61; Def. Ex. 12.[26] The plan defined as

[26] Citations to testimony at the 1976 hearing are to Volume and page numbers in the transcript. The 1976 transcript consists of 10 Volumes, each of which is paginated beginning with page 1.

"integrated" all schools in which the minority enrollment was between 25% and 74%, and there was no reassignment of pupils to or from 55 such schools. Tr. Vol. I. 149, 162; Def. Ex. 12. This feature exempted from participation in the plan 40% of all White pupils and 24% of minority pupils. Tr. Vol. III, 19. The Board plan limited desegregation by busing to grades 4-8, in a proposal which paired 38 Anglo schools with 16 minority schools. Tr. Vol. I. 99-101. Less than 5% of the Black students in the district were involved in the pairing arrangement. *Id.* at 236.

The DISD Plan proposed a continuation of the majority-to-minority transfer plan which it was estimated would involve 1,300-2,000 students, and proposed the establishment of a number of magnet schools (called Vanguard schools, Academies and Magnets at the elementary, middle and high school levels respectively) with an estimated 2,500 pupils at the beginning. *Id.* at 247-248. Overall the plan would have assigned about 20,360 Black students (one-third) to integrated schools (as defined by the DISD) and left two-thirds of them or 42,824 in predominantly Black schools. *Id.* at 306-307. It would have left between 97 to 100 one-race schools. *Id.* at 308. Under the DISD plan most Whites and Mexican-Americans were desegregated but most Blacks were left isolated. Tr. Vol. III, 21-22.

Another desegregation plan (Hall Ex. 5) was presented by Dr. Josiah Hall, who was appointed by Judge Taylor as desegregation consultant to the court

in late 1975, and called as a court witness. Tr. Vol. IV. 118. Dr. Hall served as Superintendent of Schools in Miami, Florida (Dade County) from 1957 to 1968, and worked from 1968-1972 as Asst. Director of the Florida School Desegregation Consulting Center at the University of Miami. He had assisted in drawing plans for twenty Florida school systems. *Id.* at 119-120. He prepared a plan by drawing a set of guidelines which he delivered to Dr. Estes and his staff who produced the plan in accordance with the instructions. *Id.* at 121-122. The guidelines and plan were then amended by Dr. Hall who worked with the DISD administrative staff. *Ibid.* Dr. Hall's guidelines included *inter alia*:

1. Assign kindergarten and first grade pupils to schools near their homes without references to ethnic groups. *Id.* at 129. (Dr. Hall's exclusion of grades K-1 was based on the 45 minute shorter school day for these grades, and on avoiding separate bus runs for these pupils).

2. Assign pupils in other grades so that no school will have more than approximately 75% minority pupils or less than approximately 30% minority pupils. *Ibid.*

3. Where individual schools or adjacent schools meet the 75-30% target leave them intact or combine them. *Id.* at 129-130.

4. Assign pupils so that they spend a maximum of 30 minutes being transported. *Id.* at 130.

5. Organize other schools into grades 2-5, 6-7, 8-9 and 10-12, and arrange a pattern moving inner city pupils in grades 2-5 outward, and pupils in grades 6-7 from outer city inward. *Id.* at 131.

6. Should time and distance or other significant factors prevent achieving the 75-30% minority range this time and distance information should be carefully documented, and any such schools should have superior facilities. *Id.* at 132.[27]

Dr. Hall recommended staggering school opening times to reduce busing costs. *Id.* at 154. Dr. Hall did not conduct any actual time-distance studies in relation to the schools in the Oak Cliff area which were left all-Black under his plan. *Id.* at 176-177. Dr. Hall's plan left about 29,973 Black pupils in all-Black schools, plus another several thousand in grades K-1 who were excluded from his plan to make a total of about 34,000 in all-Black schools. *Id.* at 814-185; Hall Ex. 5. Plaintiffs' expert witness Dr. Willie said Dr. Hall's plan would leave 34 one-race schools with 50% of the Blacks in the system segregated. Tr. Vol. III. 29.

Plaintiffs presented two plans prepared by Plaintiffs' attorney Edward Cloutman (Vol. III, 230 *et. seq.*) and staff following guidelines set forth by Plain-

[27] Other guidelines stated by Dr. Hall had to do with utilizing remedies in Title VII of Public Law 93-800, insuring that transportation should not be disproportionate for any ethnic group, and using 72 passenger school buses. *Id.* at 132-137.

tiffs' expert witness Dr. Charles V. Willie, a Professor at the Harvard University Graduate School of Education. Dr. Willie had served as one of the court-appointed masters in the Boston school desegregation case (Tr. Vol. III. 2-5) and was a Black native of Dallas who had attended its segregated public schools. *Id.* at 15. Dr. Willie proposed that desegregation should be based on creating several desegregated subdistricts each of which would have no population group constituting less than about one-third or more than two-thirds. *Id.* at 5-6. He recommended a uniform grade structure, and that attendance areas should be redrawn and not based upon those used during the period of segregation. *Id.* at 7. He thought the plan should deal with all grades in the system, exempting only kindergarten because it was a voluntary program which pupils were not required to attend. *Id.* at 10. He thought that magnet schools which would have the district-wide racial ratios were useful, and that there should be a few such schools with extraordinary program offerings. *Id.* at 11.[28]

Plaintiffs' Plan A, (Pl. Ex. 16) was preferred by the majority of the class members who met with counsel to consider the plans. Tr. Vol. III. 286. Plan A would have desegregated every school in the district. *Id.* at

[28] Dr. Willie also advocated a program to monitor desegregation (*Id.* at 8), and affirmative action to hire minority teachers and administrators, (*Id.* at 11), human relations training for school staff (*Id.* 12), community preparation (*Id.* at 13), and due process procedures for student discipline (*Id.* at 14).

293. The plan used Dr. Willie's concept of creating integrated subdistricts and then using pairing to desegregate the schools within each subdistrict. *Id.* at 239. Plan B used the same techniques but achieved less success in desegregating the system because it was based on a 30 minute time limit for pupil transportation. *Id.* at 261. This 30 minute limit resulted in leaving eight elementary schools, two junior highs and one high school all Black in the Oak Cliff area in the southern part of the city. Plan A which desegregated all of the schools had some bus trips which plaintiffs knew to be longer than 30 minutes. *Id* at 373. One of the longer proposed pairings, between Lisbon school in Oak Cliff and Withers school in northern Dallas, was measured as 22 miles and the trip required 35 minutes when the distance was measured on a Sunday. *Id.* at 375, 382. Plaintiffs estimated that Plan A transported 55,484 pupils for purposes of desegregation; the district court opinion stated a higher figure of 69,000 students based on a DISD exhibit. Pl. Ex. 16; Def. Ex. 21; 412 F.Supp. at 1200. Similarly, plaintiffs stated that Plan B bused 37,847 students for desegregation and the DISD thought it was 47,000. Pl. Ex. 16; Def. Ex. 21; 412 F.Supp. at 1200.

The NAACP Plan (NAACP Ex. 2) was devised by Dr. Charles Hunter of Bishop College in Dallas. He proposed a system of pairings in which pupils would be bused to and from segregated neighborhoods in both directions in grades 1-3 and 4-6, and a desegregated feeder pattern for secondary schools. Tr. Vol IV. 6. The plan proposed to eliminate all one-race schools. *Id.* at 41. Dr. Hunter calculated that about 40,000 students would be bused under his plan. *Id.* at 47. He estimated that the maximum transportation time would be 40 minutes. *Id.* at 53-44.

B. Court Ordered Plan—Dallas Alliance Concept as Developed by DISD.

The desegregation plan contained in the final order of April 7, 1976 (Pet. App. No. 78-253, pp. 53a-129a), was based on concepts of the Educational Task Force of the Dallas Alliance, an *amicus curiae* in the case, and was developed in its details by the DISD in accordance with the district court's direction. The concept was presented by Dr. Paul Geisel, Executive Director of the Dallas Alliance. Tr. Vol V. 2 *et. seq.* The Dallas Alliance proposal as revised March 3, 1976 was in Court Exhibits 8-9, Tr. Vol. IX. 361. The Alliance proposed the general concepts which appear in the final order, including creating a group of desegregated subdistricts but also an all-Black Oak Cliff subdistrict; leaving grades K-3 on a neighborhood assignment plan; using the integrated subdistricts to desegregate grades 4-8 by busing pupils to schools located in the center of the subdistricts (all formerly White schools); assigning high school students to the nearest area high school; and establishing several magnet high schools. Court Exhibit 8. The plan attempted to limit busing to 30 minutes. Tr. Vol. V. 49. Dr. Geisel acknowledged that at the K-3 level between 108 and

138 schools would remain one-race schools under the concept. *Id.* at 197-198. He acknowledged that the plan would leave an estimated 18,000 students in the all-Black Oak Cliff subdistrict. *Id.* at 208. He estimated the plan would require transportation of about 14,000 students, and said that the attempt was to keep bus rides down to 20 minutes. *Id.* at 258. The Alliance proposal left seven one-race high schools; three in North Dallas and four in the Black area in the south. *Id.* at 335.

Appendix A to the district court's Final Order of April 7, 1976 (Pet. App. No. 78-253, 84a-120a, 123a-125a) contains projected enrollments by race in each subdistrict and school except the voluntary district-wide magnet schools. The tables in Appendix A detail the extent of desegregation which was sought and the degree of segregation which was to continue. *Id.* at 84a *et seq*.

The order projected enrollments for 19 high schools with attendance districts.[29] The substantial segregation which the order contemplated at the high school level is indicated in the note below which is drawn from the court's appendix.[30] The court ordered plan

[29] The Magnet high schools are apparently not included in the projection.

30/

School	Senior High Schools 9-12 Anglo		Black		M-A		Minority	Total	Bldg. Cap.
Northwest Subdistrict	No.	%	No.	%	No.	%	%		
Hillcrest 1/	1634	96.2	38	2.2	27	1.6	3.8	1249 1/	1800

contemplated that there would be five all-Black high schools enrolling nearly 80% of all Black high school students (11,323 out of 16,269 or 69.59%). Note 30, *supra*.

School	Senior High Schools 9 - 12 Anglo		Black		M-A		Minority	Total	Bldg. Cap.
	No.	%	No.	%	No.	%	%		
Thos. Jefferson	1583	68.4	465	20.1	267	11.5	31.6	2315	2100
North Dallas	280	17.2	620	38.1	728	44.7	82.8	1628	1100
L.G. Pinkston 2/	108	4.9	1506	68.2	594	26.9	95.1	1633 2/	3000
W.T. White	2585	96.1	43	1.6	61	2.3	3.9	2689	2600
Northeast Subdistrict									
Bryan Adams	3240	95.2	0	0	163	4.8	4.8	3403	3500
James Madison	0	0	1685	98.1	30	1.7	99.8	1715	2100
Skyline	2040	64.6	925	29.3	193	6.1	35.4	3158	4000
Woodrow Wilson	888	59.0	287	19.0	331	22.0	41.0	1506	1500
Southeast Subdistrict									
Lincoln	0	0	1380	100.0	0	0	100.0	1380	2100
W.W. Samuell 3/	1850	89.0	89	4.3	140	6.7	11.0	2079	3000
H. Grady Spruce	1667	71.7	412	17.7	246	10.6	28.3	2325	3000
Southwest Subdistrict									
David W. Carter	705	38.3	1051	57.0	87	4.6	61.7	1843	2000
Justin F. Kimball	1653	74.6	306	13.8	258	11.6	25.4	2217	2100

1/ The former Franklin school will house 450 ninth grade students from Hillcrest High School.

2/ The former Edison school will house 575 ninth grade students from L.G. Pinkston High School.

3/ Children enrolled in the program for the deaf are included.

In the newly created East Oak Cliff subdistrict the plan contemplated that there would be two high schools, four middle schools and 20 elementary schools which would be over 90% Black. Pet. App. No. 78-253, 113a-118a. The total projected pupil population of the East Oak Cliff subdistrict was:

	Pupils	Percentage
Anglo	512	1.9
Black	26,202	95.3
Mexican-American	783	2.8

Id. at 84a.

To explain the manner in which the plan desegregates some grades but not others in the "integrated" subdistricts we use as an example the C.F. Carr school area, a minority area located in the Plan's Northwest subdistrict. At the K-3 level, pupils living in the Carr area attend Carrschool which serves only those grades. Carr was projected by the court to be .3%

Sunset	1216	60.8	124	6.2	661	33.0	39.2	2001	1800
Adamson	440	32.6	438	32.5	471	34.9	67.4	1349	1300
East Oak Cliff Subdistrict									
Roosevelt,F.D.	7	.3	2590	99.1	17	.6	99.7	2615	2200
South Oak Cliff[4/]	0	0	4162	100.0	0	0	100.0	2762	2600[4/]
Seagoville Subdistrict									
Seagoville 7-12	817	81.1	148	14.7	43	4.3	19.0	1008	750

4/ The former Zumwalt School will house 1,400 ninth grade students from South Oak Cliff High School.

Source: Pet. Appendix No. 78-253, pp. 90a, 97a, 104a, 111a, 117a, 119a.

Anglo, 96.1% Black, and 3.3% Chicano. Id. at 85a. Carr area pupils in grades 4-6 are bused northward to attend the Burnet school. *Id.* at 86a-87a. Burnet also receives pupils from the Anglo Cabell school area as well as its own area and was projected by the court ordered plan to be 52.3% Anglo, 38.1% Black and 9.6% Chicano. *Id.* at 86a. The plan provided that pupils in grades 7 and 8 who live in the Carr area would be transported a considerable distance farther north to the E.D. Walker school, which would be fed by pupils from about ten other schools. Walker was also projected to be desegregated under the plan with a student body 51.9% Anglo, 46.8% Black, and 1.3% Chicano. *Id.* at 88a. Then at the high school level in grades 9-12 pupils living in the Carr area are assigned to the nearby L.G. Pinkston High School. *Id.* at 91a. However, since the plan does not use the same desegregative methods at the high school level, the Carr area pupils attend a predominantly minority high school. Pinkston was projected by the plan to enroll 4.9% Anglos, 68.2% Blacks, and 26.9% Chicanos. *Id.* at 90a. The Pinkston area was made up of the attendance zones of Carr and five other predominantly minority elementary schools. *Id.* at 91a. The pattern at Carr is duplicated throughout the "integrated" subdistricts of the plan: Minority pupils are segregated in grades K-3 and 9-12. They attend desegregated schools in grades 4-8 when they are bused to formerly all-White schools in the northern part of the school district.

The court ordered plan was implemented in September 1976. The DISD report to the district court filed in April 1979 indicates the results achieved after three years of operation. In 1979 Black students continued to be substantially isolated in the DISD. Nearly three out of every five Black pupils attended a 90% or more Black school. To be precise, 58.93% of all Black pupils (38,484 out of 65,302) attend schools which are less than 10% Anglo. The accompanying chart indicates the results of 24 years of school desegregation litigation against the DISD.

1979

Percentage of White Students	No. of Schools	White No.	White Students %	Black No.	Black Students %	Hispanic No.	Hispanic Students %	Other No.	Other Students %
90-100	7	3,643	8.14	129	.2	153	.7	51	3.76
80-89	11	4,628	10.35	309	.47	414	1.9	107	7.89
70-79	9	4,574	10.23	1,013	1.55	363	1.66	59	4.35
60-69	8	3,681	8.23	1,365	2.09	558	2.55	83	6.12
50-59	22	11,295	25.25	6,568	10.06	2,552	11.69	253	18.64
40-49	24	7,906	17.68	5,002	7.66	4,580	20.97	275	20.26
30-39	20	5,004	11.19	4,707	7.21	4,319	19.78	187	13.78
20-29	13	1,711	3.83	2,671	4.09	2,251	10.31	139	10.24
10-19	15	1,635	3.65	5,054	7.74	4,044	18.52	123	9.06
1-9	24	547	1.22	13,475	20.63	2,158	9.88	56	4.13
Less than 1%	34	104	.23	25,009	38.3	446	2.04	24	1.77
Total	187	44,728	100	65,302	100	21,838	100	1,357	100
% of Total		33.57		49.02		16.39		1.02	

Source: This table is derived from data in the April 15, 1979 DISD Report to the District Court.

The 1979 DISD report to the Court indicates that there are now eight high schools with 90% or more minority pupils enrolling 59% of the Black high school pupils (11,047 of 18,718). The East Oak Cliff subdistrict in 1979 enrolled a total of 26,770 pupils in 26 schools, e.g., three high schools, three middle schools and twenty elementary schools; 25,830 (96.49%) of these pupils are Black, 648 (2.42%) are Mexican-American, 273 (1.02%) are Anglo, and 19 (.07%) are other ethnic groups.[31]

The voluntary desegregation programs in the district involve relatively small numbers. In 1979 the majority-to-minority transfer program was used by 1,403 pupils or about 1.5% of the pupils in the district. Ninety-six percent of the majority-to-minority transfer pupils were Black. A total of 8,641 pupils or 6.47% of the district's pupils were involved in the magnet-type schools at all levels: 2,466 at Vanguard schools (grade 4-6), 2,719 pupils at Academies (grade 7-8) and 3,456 at Magnets (9-12).

The April 1979 report also indicates the current extent of pupil transportation "for desegregation purposes" in the DISD:

[31] The April 1979 report indicated the 26 schools currently in the East Oak Cliff subdistrict (excluding Magnets): Smith, Roosevelt and South Oak Cliff High Schools, Ervin, Storey and Stone Middle Schools, and the following elementary schools: Bowie, J.N. Bryan, Budd, Bushman, Darrell, Harllee, Johnston, Lisbon, Marsalis, Marshall, McMillan, Miller Mills, Oliver, Patton, Pease, Russell, Seguin, Thornton, Young.

Grades 4-6	8,127
Grades 7-8	3,846
Vanguards	328
Academies	806
Magnets	3,456
	16,456

Thus about 12.4% of the pupils in the DISD are being bused "for desegregation purposes".

V. The 1978 Fifth Circuit Decision.

On May 22, 1978 the Fifth Circuit remanded the case to the district court "for the formulation of a new student assignment plan and for findings to justify the maintenance of any one-race schools that may be a part of that plan." 572 F.2d 1010, 1018. The opinion of the court by Judge Tjoflat, speaking for a unanimous panel with Judges Coleman and Fay stated:

> The DISD acknowledges that the creation of the all black East Oak Cliff subdistrict and the existence of a substantial number of one-race schools militate against the finding of a unitary school system. It contends, however, that this is the only feasible plan in light of natural boundaries and "white flight." The district court was instructed in the opinion of the prior panel to consider the techniques for desegregation approved by the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S.

1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). We cannot properly review any student assignment plan that leaves many schools in a system one-race without specific findings by the district court as to the feasibility of these techniques. *Davis* v. *East Baton Rouge Parish School Board*, 570 F.2d 1260 (5th Cir. 1978). There are no adequate time-and-distance studies in the record in this case. Consequently, we have no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing. See *Mims* v. *Duval County School Board*, 329 F.Supp. 123, 133-34 (M.D. Fla.) *aff'd* 447 F.2d 1330 (5th Cir. 1971).

Of particular concern are the high schools that are one race. Although students in the 4-8 grade configurations are transported within each subdistrict to centrally located schools to effect desegregation the district court's order leaves high school students in the neighborhood schools. Within three of the four integrated subdistricts, this results in high schools that are still one-race schools. The district court is again directed to evaluate the feasibility of adopting the *Swann* desegregation tools for these schools and to reevaluate the effectiveness of the magnet school concept. If the district court determines that the utilization of pairing, clustering, or the other desegregation tools is not practicable in the DISD, then the district court must make specific findings to that effect.

572 F.2d at 1014-1015 (footnotes omitted).

SUMMARY OF ARGUMENT

I. The District Court Properly Held that the DISD was not a Desegregated Unitary System in 1970-71.

Dallas schools were operated on a racially segregated basis pursuant to an elaborate code of segregation statutes that were not repealed until 1969. The progress of desegregation was slow and limited during ten years of litigation from 1955 to 1965 before several district judges who simply refused to enforce *Brown* v. *Board of Education* for years and whose judgments in the case were reversed on appeal seven times. See Opinions Below, *supra*. The strong reluctance of the court to desegregate the Dallas Schools is exemplified by Judge Davidson's unusual opinion in *Borders* v. *Rippy*, 184 F.Supp. 402 (N.D. Tex. 1960). Desegregation finally began with a grade-a-year plan in 1961 which was accelerated to reach all grade levels in 1967 as the result of several appellate decisions. The last order in the case by Judge Davidson in 1965 approved a DISD plan to desegregate the schools under a resolution which gave the Superintendent *carte blanche* as to how to desegregate the system. This case was filed in 1970 after the first litigation had been dormant for five years during which period the level of segregation in the DISD actually increased. Plaintiffs proved at the 1971 liability trial that over 90 percent of Black pupils attended schools which were 90% or more Black, that faculties were still largely segregated in the same pattern as the

students, and that the school district had not taken steps to comply with intervening decisions of this Court or of the Fifth Circuit which spelled out the affirmative duty to dismantle the dual school systems. *Green* v. *County School Board*, 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33 (1971); *Bradley* v. *School Board*, 382 U.S. 103 (1965); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969); *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969), rev'd in part on other grounds *sub. nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 226 (1969). The DISD acknowledged at the trial that its faculty segregation was not in compliance with *Singleton*, and that it had not adopted a majority-to-minority transfer program as required by the governing case law. The Board contended that its pupil assignment policy based on neighborhood zones are lawful, but readily admitted that zones had not been designed to eliminate one race schools. This placed the board in conflict with Fifth Circuit decisions such as *Davis* v. *Board of School Commissioners, of Mobile County*, 393 F.2d 690 (5th Cir. 1968); *Davis* v. *Board of School Commissioners, of Mobile County*, 414 F.2d 609 (5th Cir. 1969), as well as this Court's decisions in *Swann* and *Davis*, cited *supra*. The district court's finding that the system was not unitary was not appealed by the DISD which limited its appeal to remedy issues. The arguments of the Curry and Brinegar intervenors,

neither of whom participated in the liability trial, attacking the court's finding of a violation are entirely without merit. Their arguments that additional findings of "intentional" segregation are required in a case such as this are entirely put to rest by this Court's recent decision in *Columbus Board of Education* v. *Penick*, ___ U.S. ___ (July 2, 1979) and *Dayton Board of Education* v. *Brinkman*, ___ U.S. ___ (July 2, 1979) (*Dayton II*). The DISD had not fulfilled its affirmative duty to desegregate and "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus, supra*, slip opinion at 8. Because the remaining segregation in the system was so extensive, affecting 90% of Black pupils when the case was filed, a system-wide remedy was required in accordance with *Swann* and *Davis*. Cf. *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

II. The Court of Appeals was Correct in Deciding that the Court-Adopted Desegregation Plan Failed to Comply with *Swann*.

The District Judge announced his opposition to "massive busing" at the start of the case, before any evidence on remedies, and in the order directing the DISD to file a plan to comply with the *Swann* case. The Fifth Circuit has twice reversed plans approved by the district judge which left much of the segregation intact. The first district court order reversed by

the Fifth Circuit avoided any reassignment of elementary school children by adopting a ten million dollar plan for Black and White children to get common instruction for a few hours each week by television while remaining in their segregated schools. Because this order was stayed, and the appeal was not decided for years, there was no elementary school relief until 1976 six years after the case was filed. The secondary school plan which was reversed on the first appeal was designed to achieve minimal desegregation by bringing one-race schools to a point just below the 90% one-race point. A few Black students were assigned to White schools and a few Anglos (only a handful of whom subsequently attended) were assigned to 100% Black schools to bring them slightly under 90% Black enrollments. The Fifth Circuit held that this was not a *bona fide* desegregation effort.

On remand, the district court adopted another plan which insured that much segregation would remain. The approved plan limited affirmative desegregation steps to grades 4-8 thus excluding the primary and high school grades from any additional desegregation, except for voluntary transfers. By limiting real desegregation efforts to less than half the grades in the system the Court insured that the dual system would not be dismantled. Failure to desegregate high schools, was justified on the basis of the failure of the 1971 effort, and the fear of White flight. The segregation in the system was reinforced by the plan's creation of a new all-Black subdistrict consisting of

26 schools and over 26,000 Black pupils who were precluded from desegregation at any grade level, except by voluntary transfers out of the subdistrict. The Fifth Circuit properly remanded the case for the development of a new plan and for specific findings to justify any one-race schools which may be a part of a new plan. The Fifth Circuit remand was required by *Swann* and *Davis* because the DISD had failed to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. The DISD should be ordered to promptly adopt a plan in compliance with *Swann* and *Davis*.

III. The Arguments of the Brinegar and Curry Petitioners for a Modification or Overruling of *Swann* should be Rejected.

The remaining arguments of the intervening groups representing integrated neighborhoods in East Dallas and Anglo areas of North Dallas are insubstantial and without merit. The argument for a special rule exempting their areas from inclusion in a desegregation plan is contrary to *Swann's* requirement of system-wide remedies. Their position would engraft onto the law a new principle designed to create havens for white flight by establishing zones in a dual system which would be exempt from desegregation remedies. The Fifth Circuit quite properly saw no merit in the argument when it was advanced by the Curry group in the 1971 appeal.

The Curry arguments for an overruling of *Swann* are based on anti-busing social science testimony

which was highly disputed at the trial and which the district court declined to attempt to evaluate. Respondents disagree with virtually all of the Curry assertions about the desegregation process, and submit that their rebuttal witnesses entirely discredited the Curry evidence. In view of the recency of this Court's decisions on the subject we make no detailed submission on the point and rely on *Columbus* and *Dayton II*, as a reaffirmation of *Swann*.

ARGUMENT

I. The District Court Properly Held that the DISD was not a Desegregated Unitary System in 1970-71.

The district court's 1971 finding of a constitutional violation is unassailable. The finding rests on a record which demonstrates conclusively that, prior to the filing of the suit in 1970, the DISD had not effectively dismantled the dual school system as required by this Court's decisions in *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

Until 1961 the DISD was totally segregated under an elaborate and detailed code of school segregation laws. Statement *supra* at Part II. The DISD's defense of its segregation was so strong and the district court

was so reluctant to enforce *Brown* that the DISD was not enjoined to desegregate all grade levels until seven appeals produced the 1965 order calling for complete desegregation by September 1967—thirteen years after *Brown I*. One must read the opinions of Judge Davidson, and his predecessors on the district bench in the earlier Dallas school case[32] to recall the realities of the era of massive resistance to *Brown*, and the sad fact that "the dilatory tactics of many school authorities",[33] sometimes met with judicial approval rather than disapproval. Such was the case in Dallas. See Opinions Below, part II., *supra*.[34]

A reading of Judge Davidson's opinions in the prior Dallas school case conveys an understanding of the context of the 1965 order which approved a school board resolution giving the Superintendent virtually complete discretion, and little or no direction, as to how to desegregate the system. Statement *supra* Part

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[32] See Opinions Below, Part II, *supra*; see particularly *Borders* v. *Rippy*, 184 F.Supp. 402 (N.D. Tex. 1960).

[33] The quoted phrase is from *Swann* v. *Board of Education*, 402 U.S. 1, 14 (1971), and appears in a passage which refers to *Alexander* v. *Holmes County Board of Ed.*, 396 U.S. 19 (1969); *Griffin* v. *School Board*, 377 U.S. 218 (1964); and *Green* v. *County School Board*, 391 U.S. 430 (1968).

[34] The DISD brief complains of the burden of two and a half decades of school desegregation litigation, but contains no word of acknowledgement that the DISD shares any responsibility for the delay in establishing a unitary system. The opinions below make it evident that the DISD had many opportunities over the years to shorten the litigation by *bona fide* compliance with *Brown*.

II. The arguments of some of the petitioners that the pupils in Dallas have been assigned to schools by the federal courts since 1965 are readily dispelled by a reading of the 1965 proceedings and order. *Ibid.* The *Tasby* respondents filed this case after five years experience under the 1965 order had *increased* the level of segregation of Black pupils and the DISD had ignored intervening decisions by this Court and the Fifth Circuit in desegregation requirements. *Ibid.*

The "desegregated" DISD attendance areas were established without any effort to eliminate one-race schools even though Fifth Circuit Law held that was a School Board's duty. See *Davis* v. *Board of School Commissioners of Mobile County*, 393 F.2d 690 (5th Cir. 1968); *Davis* v. *Board of School Commissioners of Mobile County*, 414 F.2d 609 (5th Cir. 1969); Statement, *supra* Part II. The district failed to begin a faculty desegregation program until 1968, and when the suit was filed Black schools were readily identifiable by their disproportionately all-Black faculties, while only a handful of Black teachers taught in White schools. Statement, *supra* Part II. The district had not promoted integration by affirmative race-conscious means such as rezoning, pairing or clustering of schools, changes of grade structures, or transportation prior to the suit. In 1970-71 the Magnet school program had not been developed except at Skyline High School which was virtually all-White. Prior to the filing of the lawsuit and thereafter the DISD continued to plan, build and open new one-race schools in

a manner which was found by the Fifth Circuit to violate the principle of *Swann*. *Ibid.* Prior to the 1971 trial the DISD did not acknowledge any duty to plan new schools so as to promote desegregation. *Ibid.* All of this evidence was uncontradicted and came from the DISD witnesses and records.

The trial court's finding that the system was dual in 1970-71 thus rests on more than the strong showing of racial isolation. However, in view of the prior statutory dual system the statistics themselves were so compelling that Judge Taylor wrote . . . "it would be less than honest for me to say or to hold that all vestiges of a dual system have been eliminated in the Dallas Independent School District, and I find and hold that elements of a dual system still remain." 342 F.Supp. 947. That was indeed the only supportable conclusion about a system which had never taken affirmative steps to bring about integregation and which had 90% of its Black pupils in 90% or more Black schools and over 60% of them in 99-100% Black schools. In subsequent reference to this finding, Judge Taylor in 1976 equivocated somewhat, stating: "This Court has kept in mind throughout these proceedings that its findings in 1971 were that the 'vestiges' of a dual school system remained in the DISD, and not that the DISD was a dual system at that time." 412 F.Supp. at 1196. However, less than a month later in a Supplemental Opinion of April 7, 1976 Judge Taylor reaffirmed unequivocally his finding that the system was dual:

So that there can be no mistake about this matter the Court will state once again: it has no interest in "running the school district" or in playing the role of dictator to the School Board or Dr. Estes and his staff. However, the Court will not stand aside where the DISD has been found to operate a dual school system which discriminates between Anglo and minority schools, as was found in 1971 and as was reemphasized in the disparity shown in Dr. Chase's report and other evidence introduced during the recent hearings. The DISD must provide equal educational opportunity for all its students, in non-student assignment matters as well as in the area of student assignment.

* * *

With regard to the first item, the Court is quite aware that one of the central findings of the Chase Report was that a disparity remains between the predominantely Anglo centers and the predominantely minority centers in the areas of (a) facilities, (b) staffing patterns, and (c) educational offerings. The Court adopted these findings of Dr. Chase on page 9 of its Opinion when it said ". . . there is still a gap between intent to provide equal educational opportunity and the achievement of this goal."

The Court is of the opinion that the DISD can and must correct these disparities—that is what "providing equal educational opportunity" is all about.

412 F.Supp. at 1211.

Petitioners' briefs make a great deal of the fact that the 1971 liability finding is couched in terms of "*vestiges* of a dual system" (emphasis ours). 342 F.Supp. at 947; Pet. Br. No. 78-253, pp. 58-60; Pet. Br. No. 78-283, pp. 24-26; Pet. Br. No. 78-282, p. 9. The DISD argues that there was a mere "trace" of a dual system in 1970-71, and the "the dual system was no more." Pet. Br. No. 78-253, p. 59. The argument is thin indeed when it is measured against the simple facts stated by the district judge that in 1970-71 "91% of Black students [are in] 90% or more . . . minority schools, 3% of the black students attend schools in which the majority is white or Anglo." 342 F.Supp. at 947. Petitioners' emphasis on the word "vestiges" should not be permitted to conceal the obviously substantial extent of the racial isolation in Dallas in 1970-71. The segregation of 90% of Black pupils is clearly substantial and requires and system-wide remedy. *Swann, supra; Davis, supra; Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Columbus Board of Education* v. *Penick*, ____ U.S. ____, (July 2, 1979), slip opinion 5-7.

The fact that this case reopened litigation to desegregate the DISD after five years experience with a prior court order which had conspicuously failed to eliminate the dual system does not create any novel issue. The Fifth Circuit has required many districts to improve older ineffective desegregation plans in light of *Swann*. See e.g., *Ellis* v. *Board of Pub. Inst. Orange County, Fla.*, 465 F.2d 878, 879-890 (1972),

cert. denied 410 U.S. 966 (1973); *Lee* v. *Autauga County Bd. of Ed.*, 514 F.2d 646, 648 (1975)("The 1970 plan is a remedy for state-enforced segregation and not a judicial eraser that wiped clean the county's constitutional slate."); *Hereford* v. *Huntsville Bd. of Ed.*, 504 F.2d 857 (5th Cir. 1974), *cert. denied* 421 U.S. 913 (1975); *Lee* v. *Tuscaloosa City School System*, 576 F.2d 39 (5th Cir. 1978); *Miller* v. *Board of Ed. of Gadsden*, 482 F.2d at 1234 (5th Cir. 1973); *United States* v. *Board of Ed. of Valdosta*, 576 F.2d 37 (5th Cir.), *cert. denied* 99 S.Ct. U.S. 622 (1978); *United States V. South Park Ind. Sch. Dist.*, 566 F.2d 1221 (5th Cir.), *cert. denied* 99 S.Ct. 622 (1978); *United States* v. *Columbus Mun. Sep. School Dist.*, 558 F.2d 228 (5th Cir. 1977), *cert. denied* 434 U.S. 1013 (1978); *United States* v. *DeSoto Parish School Board*, 574 F.2d 804 (5th Cir.), *cert. denied* 99 S.Ct. 571 (1978); *United States* v. *Seminole County Sch. Dist.*, 553 F.2d 992 (5th Cir. 1977).

Swann would have had little impact if the courts had not applied it to school districts which had earlier desegregation plans, because most southern systems had some orders before 1971. A sequence of events similar to that in Dallas occurred in *Swann*. As this Court recently recalled in *Columbus Board of Education* v. *Penick*, ____ U.S. ____, (July 2, 1979), in *Swann* an initial plan had been entered in 1965—the same year as Judge Davidson's order in Dallas—and affirmed on appeal by the Fourth Circuit, but the case was reopended and in 1969 the school board was required to adopt a more effective plan. *Columbus*, slip opinion p. 9; *Swann*, *supra*, 402 U.S. at 7. Indeed in *Swann* unlike Dallas, the 1965 pupil assignment program had been scrutinized in detail by both the court of appeals and the district court. *Swann* v. *Charlotte Mecklenburg Board of Ed.*, 369 F.2d 29 (4th Cir. 1966), affirming 243 F.Supp. 667 (W.D. N.C. 1965).

In Dallas the development of desegregation was left entirely to the discretion of the school authorities save for the direction that desegregation include certain grade levels on a specified schedule. Judge Davidson never passed on the attendance areas adopted by the DISD or ruled that the system had become unitary; his order of August 27, 1965 merely found that the "plan of desegregation was adopted in good faith and is being implemented and carried out with due diligence and constitutes deliberate speed under local circumstances and conditions", and approved the plan and ordered "defendants to proceed with integration in accordance with such plan". Def. 1971 Ex. 2.

In both *Swann* and Dallas it was clear that the school districts had not, prior to the reopening of the cases, taken steps to obey the mandate of *Green* to "dismantle the well-entrenched dual systems" and fulfill the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green*, *supra*, 391 U.S. 430, 437-438

(1969). It was that failure which supports the court orders requiring new desegregation steps.

When the record and findings in Dallas at the time of the violation hearing in 1971 are measured against this Court's recent *Columbus* decision, *supra*, and the companion case *Dayton Board of Education* v. *Brinkman*, ___ U.S. ___ (July 2, 1979) (*Dayton II*), the existence of a constitutional violation in Dallas in 1971 seems undebatable. *Columbus* and *Dayton* reaffirm *Green* and *Swann* and the concept of an affirmative duty to desegregate. Some of the petitioners argue that there was no violation in 1971 because the district court failed to make findings that the DISD engaged in acts of intentional segregation after the 1965 court order. Thus it is argued by Brinegar et. al. that the segregation which existed in 1970-71 was not "intentional" and thus was not unconstitutional,[35] citing *Washington* v. *Davis*, 426 U.S. 229, 239 (1976); *Dayton Board of Education* v. *Brinkman*, 433 U.S.

[35] The Brinegar argument was not urged by Brinegar et. al. in either court below. In the district court Brinegar et. al. contended that some East Dallas schools were already desegregated by reason of residential integration and that such areas should not be subject to a busing plan. In the Fifth Circuit Brinegar et. al. urged affirmance of the district court's plan, but never made an argument that there should not be any remedy at all. It should be noted that Brinegar et. al. intervened in the case in 1975 after the Court of Appeals had affirmed the 1971 liability holding. This Court might simply decline to deal with the Brinegar argument on the ground that it was not raised or passed on below. *Adickes* v. *Kress & Co.*, 398 U.S. 144. 147, n.2 (1970) and cases cited.

406 (1977)(*Dayton I*); *Austin Independent School Dist.* v. *United States*, 429 U.S. 990 (1977); and *Pasadena City Board of Ed.* v. *Spangler*, 427 U.S. 424 (1976). Pet. Br. No. 78-283, pp. 23-35. Curry et.al. argue similarly that the DISD adopted "a racially neutral plan" in 1965 and that the 1971 finding of liability in this case is contrary to *Pasadena*, *supra*, and *Dayton I*, *supra*.[36]

But of course segregation established pursuant to racial segregation statutes is "intentional."[37] *Colum-*

[36] Curry et.al. did not participate in the 1971 liability trial because they did not seek to intervene until July 9, 1971 making a motion for a continuance of the trial which was scheduled to and did begin three days later on July 12, 1971. See Docket entries. The district court allowed the intervention on July 22, 1971 after having filed the opinion determining liability. Curry et.al. appealed the 1971 judgment arguing that their North Dallas area was not subject to be included in the desegregation plan because it was developed after *Brown*. The Fifth Circuit rejected this argument. 517 F.2d at 108. The DISD supported the District Court's order in the 1971 appeal, and stated unequivocally in a brief: "This appeal, on the other hand, involves only the issue of remedy." Supplemental Brief of DISD in Fifth Circuit No. 71-2581, p. 3. Although the DISD petitioned for certiorari arguing other points (Pet. for Certiorari No. 75-265), Curry et.al. did not file a certiorari petition. Instead they have continued to seek to relitigate the findings of a trial in which they did not participate. Their present brief attacks the Fifth Circuit's 1975 decision with arguments not made in the first appeal. Pet. Br. No. 78-282, pp. 18-19.

[37] The Fifth Circuit rejected similar arguments based on *Spangler* and *Washington* v. *Davis*, *supra*, in *United States* v. *Seminole Cty. Sch. Bd.*, 553 F.2d 992 (5th Cir. 1977); *United States* v. *Board of Education of Valdosta*, 576 F.2d 37 (5th Cir.), *cert. denied* 99 S.Ct. 622 (1978).

bus and *Dayton II* demonstrate that this Court adheres to its holding in *Green, supra*, 391 U.S. at 437-442, and companion cases,[38] that it is the *effectiveness* of a desegregation plan in dismantling dual systems that determines compliance with *Brown*. Mr. Justice White's opinion in *Dayton II* stated:

> But the measure of the post-*Brown* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system. *Wright, supra*, at 460, 462; *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971); see *Washington* v. *Davis*, 426 U.S. 229, 243 (1976). As was clearly established in *Keyes* and *Swann*, the Board had to do more than abandon its prior discriminatory purpose. 413 U.S. at 200-201, n.11, 402 U.S. at 28. The Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices "are not used and do not serve to perpetuate or re-establish the dual school system," *Columbus, ante*, at ____, and the Board has a 'heavy burden' of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends. *Wright, supra*, at 467, quoting *Green* v. *County School Board*, 391 U.S. 430, 439 (1968).

Slip opinion, pp. 10-11.

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[38] *Raney* v. *Board of Education of the Gould School Dist.*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners of City of Jackson, Tenn.*, 391 U.S. 450 (1968).

In *Columbus* the Court, after quoting the language from *Green, supra*, that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" (slip opinion at 8, quoting *Green*, 391 U.S. 430, 437-438), went on to state:

> Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment. *Dayton I*, 433 U.S. at 413-414; *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 460 (1972); *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484 (creation of a new school district in a city that had operated a dual school system but was not yet the subject of court-ordered desegregation).

Slip opinion at 8.

Using language which might be addressed to the Curry and Brinegar arguments with equal relevance the Court in *Columbus* said:

> The Board's continuing "affirmative duty to disestablish the dual school system" is therefore beyond question, *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971), and it has pointed to nothing in the record persuading us that at the time of trial the dual school system and its effects had been disestablished. The Board does not appear to challenge the finding of the District Court that at the time of trial most blacks were still going to black schools and most whites to white schools. Whatever the Board's current purpose with respect to

> racially separate education might be, it knowingly continued its failure to eliminate the consequences of its past intentionally segregative policies. The Board "never actively set out to dismantle this dual system." 429 F.Supp. at 260.

Slip opinion at 10. These holdings of *Columbus* and *Dayton II* are a reaffirmation of the holding of *Green, supra*. Portions of Mr. Justice Brennan's opinion in *Green* also seem as if they had been written in response to the Brinegar and Curry arguments:

> In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School board such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

391 U.S. 430, 437-438 (1968).

Further, *Green* stated the rule reaffirmed in *Swann, Columbus* and *Dayton*, that desegregation plans must

be measured by their "effectiveness" and that courts should evaluate such plans in practice until "state-imposed segregation has been completely removed." 391 U.S. at 439.

And of course *Swann, supra*, provides a complete answer to the Curry argument based on the alleged racial neutrality of the DISD's post-1965 neighborhood attendance areas. Putting aside for the moment the fact that the district court did not find all of the attendance areas racially neutral in the 1971 liability opinion, *Swann* makes it plain that mere "neutrality" does not fulfill the affirmative duty to dismantle the dual system:

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.
>
> No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school sys-

> tem. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

402 U.S. 1, 28 (1971).

The DISD had clearly failed to dismantle the dual system when this case was brought in 1970. The arguments of Brinegar et.al. and Curry et.al. that the courts below had no remedial authority to deal with that failure are plainly untenable in light of this Court's decision in *Green*, *Swann*, *Columbus* and *Dayton II*.

II. The Court of Appeals was Correct in Deciding that the Court-Adopted Desegregation Plan Failed to Comply with *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

The first trial in this case took place about three months after this Court in *Swann* and *Davis* directed the use of busing, pairing, rezoning and similar "affirmative action" measures to dismantle dual school

systems, and rejected the argument that desegregation could be limited to walk-in schools. *Swann, supra*, 402 U.S. 1, 27-31; *Davis, supra*, 402 U.S. 33, 37. In the wake of *Swann* and *Davis* Judge Taylor, who presided over the trials in this case, annouced his firm opposition to busing. He did so in the very order directing the school district to prepare a desegregation plan to comply with *Swann*. Judge Taylor's first opinion rejecting busing was issued July 16, 1971, before the Court had heard any evidence on remedies. *Tasby* v. *Estes*, 342 F.Supp. 945, 948-949 (N.D. Tex. 1971):

> Now all of this is not as grim as it sounds. I am opposed to and do not believe in massive cross-town bussing of students for the sole purpose of mixing bodies. I doubt that there is a Federal Judge anywhere that would advocate that type of integration as distinguished from desegregation. There are many many other tools at the command of the School Board and I would direct its attention to part of one of the plans suggested by TEDTAC which proposed the use of television in the elementary grades and the transfer of classes on occasion by bus during school hours in order to enable the different ethnic groups to communicate. How better could lines of communication be established than by saying, "I saw you on TV yesterday," and besides that, television is much cheaper than busing and a lot faster and safer. This is in no sense a Court order but is merely something that the Board might consider.

Several weeks later, Judge Taylor's above-quoted suggestion did become "a Court order" rejecting a busing plan because it would create unspecified "abrasions and dislocation" (342 F.Supp. at 950), and endorsing a plan to leave the schools segregated except for television at the elementary level and minimal satellite zoning at the secondary level. *Id.* at 951-955. The litigation which has followed in the ensuing eight years has revolved around the district court's opposition to busing[39]— announced at the start— and the countervailing efforts of the Fifth Circuit to insure that the teachings of *Swann* and *Davis* were faithfully applied.

The court of appeals has twice held that desegregation plans adopted by the district court were inadequate to dismantle the dual system and failed to comply with *Swann* v. *Charlotte-Mecklenburg Board of Education.* 402 U.S. 1 (1971). *Tasby, supra,* 517 F.2d 92; 572 F.2d 1010. We believe those conclusions were clearly justified. Indeed we submit they were compelled by a conscientious application of *Swann* and *Davis*, as well as by a line of Fifth Circuit decisions requiring other school districts and district courts to adopt effective desegregation plans. Among many Fifth Circuit decisions rejecting inadequate de-

[39] See also *United States* v. *Texas Education Agency, (Richardson Ind. Sch. Dist.),* 512 F.2d 896 (5th Cir. 1975), where the Fifth Circuit reversed an order by Judge Taylor which had failed to desegregate the few Black pupils in a suburb of Dallas by pairing nearby schools.

segregation plans are: *Davis* v. *East Baton Rouge School Board,* 570 F.2d 1260 (5th Cir. 1978) (decision by same panel as *Tasby,* also in April 1978); *Flax* v. *Potts,* 464 F.2d 865 (5th Cir.), *cert. denied* 409 U.S. 1007 (1972) (involving Ft. Worth, Texas); *Gaines* v. *Dougherty County Board of Ed.,* 465 F.2d 363 (5th Cir. 1972); *Ellis* v. *Board of Public Instruction of Orange County,* 465 F.2d 878 (5th Cir. 1972), *cert. denied* 410 U.S. 966 (1973); *Arvizu* v. *Waco Independent School District,* 495 F.2d 499 (5th Cir. 1974), on rehearing 496 F.2d 1309 (1974); *Hereford* v. *Huntsville Board of Ed.,* 504 F.2d 857 (5th Cir. 1974); *Lee* v. *Demopolis City School System,* 557 F.2d 1053 (5th Cir. 1977) *cert. denied* 434 U.S. 1014 (1978); *Lee* v. *Macon County Board of Ed. (Calhoun County),* 448 F.2d 746 (5th Cir. 1971); *Lee* v. *Macon Cty. Bd. of Ed. (Marengo County),* 465 F.2d 369 (5th Cir. 1972); *Lee* v. *Tuscaloosa City School System,* 576 F.2d 39 (5th Cir. 1978); *Lemon* v. *Bossier Parish School Board,* 566 F.2d 985 (5th Cir. 1978); *Miller* v. *Board of Ed. of Gadsden,* 482 F.2d 1234 (5th Cir. 1973); *Mills* v. *Polk County Board of Public Instruction.* 575 F.2d 1146 (5th Cir. 1978); *Weaver* v. *Board of Public Inst.,* 467 F.2d 473 (5th Cir. 1972), *cert. denied* 410 U.S. 982 (1973); *United States* v. *Board of Education of Valdosta, Georgia,* 576 F.2d 37 (5th Cir. 1978), *cert. denied* 99 S.Ct. 622 (1978); *United States* v. *South Park Ind. School Dist.,* 566 F.2d 1221 (5th Cir.), *cert. denied* 99 S.Ct. 622 (1978); *United States* v. *Desoto Parish School Board,* 574 F.2d 804 (5th Cir.), *cert. denied* 99

S.Ct. 571 (1978); *United States* v. *Seminole County School Dist.*, 553 F.2d 992 (5th Cir. 1977).

The decision below is consistent with this long line of decisions in which the Fifth Circuit has refused to sanction desegregation plans which leave one-race schools still segregated without a real justification under the principles of *Swann*. Indeed the Fifth Circuit's insistence that pairing and grouping of schools be used where feasible to eliminate one-race schools pre-dates *Swann*. *Allen* v. *Board of Pub. Inst. of Broward County*, 432 F.2d 362, 367 (5th Cir. 1970), *cert. denied* 402 U.S. 952 (1971) and cases cited. *Swann* would have been nullified if the Fifth Circuit had not been demanding in requiring a justification for one-race schools.

The Fifth Circuit's 1978 remand for a new pupil assignment plan and for further findings to justify the maintenance of any remaining one-race schools under that plan was a correct application of the principles of *Swann* and *Davis*. The 1976 court-adopted plan admittedly leaves many Dallas pupils in racially segregated schools. The remand for a new plan was appropriate because the 1976 plan failed to achieve the greatest possible degree of actual integration using the desegregation methods approved in *Swann* and *Davis*, and the district court failed to find that further desegregation was not practicable using such methods. Cf. *Swann*, *supra* 402 U.S. at 26. There were also no specific findings, nor could there have been, to demonstrate that the remaining segregated schools

were not the products of the dual system. Cf. *Swann*, *supra* 402 U.S. at 26.

The 1976 plan adopted by the district court made two principal choices which determined that a great deal of segregation would be untouched. One was the plan's use of affirmative action steps to promote desegregation only in grades 4-8. The choice to desegregate five grades and leave eight other grades (K-3 and 9-12) untouched by the plan (except for voluntary individual transfers) guaranteed that substantial segregation would remain. After three years of implementation, the plan has fulfilled this guarantee. The other decisive choice was the creation of a new all-Black East Oak Cliff subdivision within the school system and the adoption of a policy that students "would only be assigned to schools within the attendance subdistrict in which they live". 412 F.Supp. at 1202, 1203-1204. This decision excluded a projected 26,202 Black pupils, roughly 42% of all Blacks in the system in 1975-76, from any possibility of being assigned by the Board to a desegregated school. We discuss these two aspects of the 1976 plan separately below.

A. The District Court Erred in Refusing to Use Affirmative Integration Measures such as Pairing, Rezoning, or Transportation in the Primary Grades and High School Grades.

The decision to limit affirmative desegregation measures to grades 4-8, and to leave the "neighbor-

hood school" attendance areas intact for the lower and upper grades insured that desegregation in Dallas would affect less than half the system. We submit that there was no sufficient justification for leaving either category of schools completely untouched by affirmative desegregation measures. In other cases the Fifth Circuit has rejected similar categorical exclusions of parts of school systems from desegregation plans, and the decision to remand in this case is consistent with those prior holdings. *Flax* v. *Potts*, 464 F.2d 865 (5th Cir.), *cert. denied* 409 U.S. 1007 (1972) (no justification for excluding first grade from Fort Worth, Texas plan); *Arvizu* v. *Waco Independent School Dist.*, 495 F.2d 499 (5th Cir. 1974); on rehearing 496 F.2d 1309 (1974) (no justification for not integrating grades 11 and 12); *Mills* v. *Polk County Board of Public Inst.*, 575 F.2d 1146 (5th Cir. 1978) (not proper to leave grades 1 and 2 segregated); *United States* v. *Texas Education Agency (Austin Ind. Sch. Dist.)*, 532 F.2d 380, 393 (5th Cir. 1976), (exclusion of grades 1-5 from plan not proper); vacated on other grounds 429 U.S. 990 (1976); but cf. *Lockett* v. *Board of Education of Muscogee County*, 447 F.2d 472 (5th Cir. 1971) (permitting omission of kindergarten from plan based on peculiarities of kindergarten program); see *Thompson* v. *School Board of City of Newport News, Virginia*, 465 F.2d 83 (4th Cir. 1972), (en banc), *cert. denied* 413 U.S. 920 (1973) (en banc) (remanding on issue of exclusion of grades 1 and 2); *contra Thompson* v. *School Board of City of Newport News*, 498 F.2d 195 (4th Cir. 1974) (en banc) (approving exclusion of grades 1 and 2 by 4-3 vote of Fourth Circuit.

The primary grades were left largely segregated by the failure to use either substantial rezoning or pairing techniques in any part of the school system at these grade levels. The categorical exclusion of these grade levels precluded any analysis of the circumstances of individual schools to weigh the feasibility of pairing or busing. The use of busing to integrate the primary grades was excluded notwithstanding the fact that in some areas primary school children might be integrated with relatively short bus rides. There is simply no record basis for a conclusion that the techniques used to integrate grade 4 and 5 would not be workable in the earlier grades. The DISD doesn't provide walk-in schools for every pupil in the primary grades. Some of the "neighborhood zones" are quite large in area as may be observed from an inspection of the elementary attendance zone maps, and pupils who live more than two miles from school are provided transportation. Nearly 5,000 pupils were provided free transportation by school bus or otherwise in the DISD prior to this case. 1971 Tr. 452. Primary grade pupils are transported in the DISD; they are just not transported for desegregation purposes.

Swann indicates that decisions as to the use of busing for integration must be based on a principle of accomplishing as much desegreation as possible without interfering with the educational process or impairing the health of children. *Swann*, 402 U.S. at 29-

31. The Court in *Swann* understood that throughout the country large numbers of children of all age groups are bused to schools for reasons having nothing to do with desegregation. By indicating in the *Swann* opinion that the ages of children affect the practicalities of busing the Court did not endorse the wholesale exclusion of younger children from desegregation plans. *Swann, supra*, 402 U.S. 1, 29-31. The district court's only finding to justify the exclusion of primary grades was an agreement with Dr. Estes' bare assertion that K-3 children were not mature enough to be bused. 412 F.Supp. at 1204. Surely the Fifth Circuit stated an unexceptionable rule in holding that a district court must make more specific findings about time and distance or other similar matters which are asserted to justify one-race schools. 572 F.2d at 1014. There is not and could not be a finding in Dallas that time and distance considerations preclude all additional desegregation of the primary grade pupils.

The failure to desegregate the primary grades operates to weaken the entire process of desegregation. While we rely primarily on the case law cited above for our position, we do point out to the court that there is a strong consensus among social science students of desegregation that integration in the early grades has the most beneficial effects on the achievement of minority children. A very careful review of the literature on the effects of desegregation on

achievement by Robert Crain and Rita Mahard[40] led them to state that:

> "A comparison of the 73 studies leads to one important conclusion: that desegregation is noticeably more likely to have a positive impact on black test scores if it begins in the earliest grades, and effects are especially likely to be positive for first grades."[41]

Robert Crain testified in the Dallas case about the great importance of desegregating the early grades. Tr. Vol. III p. 434. We reprint in the footnote below a long excerpt from the Crain and Mahard article which asserts that starting desegregation in early grades has noticeable advantages.[42]

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[40] Robert Crain and Rita Mahard, "Desegregation and Black Achievement," Law & Contemporary Problems, Vol. 42 (Spring and Summer 1978) (Publication forthcoming; also published as a working paper of the National Review Panel on School Desegregation Research, Institute of Policy Sciences and Public Affairs, Duke Univ.).

[41] *Id.* at "Abstract".

[42] Crain and Mahard, op. cit.:

"Age at First Desegregation"

The review of these studies is inconclusive or debatable on nearly every point except that desegregation in the early grades is superior to desegregation in the later grades. Of the studies we have reviewed, 13 found a more positive impact for those students desegregated in earlier grades. Only 3 have found the opposite and these 3 seem to be explainable. Beker's study in Syracuse was a tiny sample—his control group contained only 23 students, which can hardly be sorted by grade to get meaningful results. A second case where a positive finding was found for a

higher rather than a lower grade was in Evans' study of the first year of desegregation in Forth Worth, but his own follow-up a year later reversed this conclusion. The third case of a more positive finding in the upper grade is in the Dade County study referred to earlier, but this seems to be explained not by the high performance of upper-grade students in white schools, but by a rather dramatic drop in the performance of the upper-grade students in segregated schools, whose achievement went down about a third of a year over the preceding year's class even though black achievement in other grades went up. The 13 positive findings are methodologically stronger. Included are the two northern experimental designs by Mahan and Zdep as well as the seemingly well done study by Schellenberg. Even some studies whose overall effects are zero show positive results in early grades. St. John and Weinberg report three other studies in which stronger results occurred in the lower grades and both reviewers conclude that desegregation in early grades is preferable.

In a final test of the hypothesis we compared the outcome of desegregation reported in the different studies depending on which grades were tested. These results also indicate that early-grade desegregation is more successful. Of twelve studies of desegregation at the junior high school and high school level, five show negative effects, while none of ten studies done in the first and second grade show negative results. Table 4 presents the data for the southern and northern halves of the sample we have reviewed, and as well as the data for 21 studies reviewed by Weinberg and St. John but not by us. All three samples support the hypothesis.

The table suggests that the critical point is around the 2nd and 3rd grade, since only 9 of the 21 cases of desegregation in grades 3 or 4 showed positive results. The poor outcomes of desegregation for third and fourth graders is suggestive, since these grades are in the center of an age range which Michael Inbar has called "vulnerable age." Inbar (1976) found that persons migrating to Israel between the ages of 6 and 11 were less likely to later attend college than those who came at either younger or older ages. He has replicated this result using migration to Canada and regional migration within the United States.

We submit that there is no more justification for the failure to adequately desegregate the high schools than there is with respect to primary grades. There has not been a *bona fide* high school desegregation effort in Dallas. The Fifth Circuit's 1975 opinion held that the 1971 plan was an unsatisfactory minimal effort to get the one-race schools slightly under the 90% point. 517 F.2d at 104. Yet that 1971 plan remains essentially intact today, with the addition of Magnet schools in 1976 being the only real change. That badly flawed 1971 effort failed to achieve even its limited objective when only 50 of 1,000 White pupils, who were assigned to all-Black schools in an effort to get the schools into the 80-90 percent black range, actually attended the Black schools. Ironically Judge Taylor cites the failure of the weak 1971 effort, which the Fifth Circuit had held not be *bona fide*, as his reason for not attempting any further high school desegregation in 1976. 412 F.Supp. at 1205. Judge Taylor concluded from this experience that anti-bus-

Crain and Weisman (1972) found a similar pattern for blacks who migrated from the south to the north at this age. Inbar quotes Harry Sullivan (1953) as theorizing that the elementary school years are an important period of establishing social relationships and recommending that social relationships not be disrupted in this time. If this theory is correct, the kind of social migration which occurs as a result of desegregation may have effects analogous to geographic migration.

It has been widely argued that desegregation should begin in the early grades. It is gratifying to see the data support our conventional wisdom so clearly, although if the Inbar finding is relevant, even third grade may not be early enough.

ing sentiment was so strong that only a voluntary Magnet Plan would be effective in Dallas to eliminate the high school segregation. *Id.* at 1205, n.50.

The Fifth Circuit criticized the failure of the 1976 plan to desegregate high schools (572 F.2d at 1014):

> Of particular concern are the high schools that are one race. Although students in the 4-8 grade configurations are transported within each subdistrict to centrally located schools to effect desegregation, the district court's order leave high school students in the neighborhood schools. Within tbree of the four integrated subdistrict,[13] this results in high schools that are still one-race schools.[14]
>
> [13] This excludes East Oak Cliff, the black subdistrict, and Seagoville, and the one predominately Anglo subdistrict.
>
> [14] In the Northwest subdistrict, one high school is 95% minority and two high schools are 96% Anglo. In the Northeast subdistrict, one high school is 99.8% minority and one is 95% Anglo. In the Southeast subdistrict, one school is 100% minority and one is 89% Anglo.

The point made by the court of appeals is a cogent one. It seems obvious that, if a feeder plan can effectively desegregate the 7th and 8th grades in parts of the city, a comparable feeder plan could integrate the same students in grades 9-12. If anything, desegregation of the high schools should be more feasible because the high school buildings have larger pupil capacities than the schools serving lower grades, and

consequently can serve broader geographic areas.[43] Larger schools serving broader areas are readily adaptable to serving more heterogeneous student populations. And, of course, many high school students go to school in their own automobiles, bicycles and public transportation. 1971 Tr. 684-685, 983-984. In the Statement, *supra* at Part IV we have explained the manner in which pupils at Carr school, a minority school in the Northwest subdistrict, are segregated in an all-Black school in grades K-3, desegregated in grades 4-6 in Burnet School and in grades 7-8 at Walker, and then are segregated again at Pinkston High School. The treatment of Carr typifies the plan's treatment of minority schools in the center of the city.

The Fifth Circuit directed that the district court reevaluate the effectiveness of the Magnet concept noting that the NAACP brief on appeal quoted Dr. Estes as having conceded its ineffectiveness. 572 F.2d at 1015, n.15. At the 1976 trial Dr. Estes estimated that at the beginning about 2,500 pupils would attend Magnet schools. Tr. Vol. I. 247. The DISD Brief in the Fifth Circuit advised that in fall 1976 the four Magnet high schools enrolled 3,688 pupils (including part time). DISD Br. 5th Cir. No. 76-1849, p. D-13.

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[43] See capacity figures in App. A to Final Order; Pet. App. No. 78-253, 84a et seq. We calculate that the median high school building capacity for the 19 high schools listed in the appendix is 2,100 students. The range is from 750 at Seagoville to 4,000 at Skyline. The capacity of South Oak Cliff was expanded to 4,000 under the plan by housing 1,400 of its 9th graders at the former Zumwalt junior high building.

The April 1979 DISD report to the District Court indicates 3,456 pupils attending Magnet high schools.[44] Thus, the actual experience with Magnet schools in the three years the 1976 plan has been implemented indicates that the Magnet schools involve only a small percentage of the pupils. The 1979 total of 3,456 is approximately 8.7% of the total high school enrollment of about 39,734. Given the very limited impact of the Magnet program, the Fifth Circuit remand for on evaluation of other assignment alternatives was required by *Green* v. *County School Board*, 391 U.S. 430 (1968). Magnet schools are a form of free choice in pupil assignments. When a plan relies entirely on Magnet schools to eliminate a dual system it must be evaluated in terms of *Green's* holding:

> "If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end."

Green, supra, 391 U.S. at 440.

After three years the plan has resulted in continuing extensive racial isolation of Black high school pupils. The DISD's April 1979 report to the district court indicated that there were 8 high schools enrolling less than 10% Anglo pupils; these 8 schools enrolled

[44] In addition to the small numbers of pupils, there is only slight desegregation at the Business Management Magnet which has but 9.5% Anglo pupils.

11,047 or 59.01% of the 18,718 Black high school students and only 90 Anglo pupils.[45]

The Fifth Circuit's remand order was if anything too moderate. The court might properly have unequivocally directed the desegregation of all levels of the DISD system, and the high school plan which had been previously rejected in 1975 might have been repudiated in stronger terms than the court used in its opinion. In any event, the remand was amply justified by the failure of the DISD to use affirmative desegregation measures in more than half the grade levels in the system.

[45] The following table indicates the 1979 high school enrollments:

High schools —— 1979

Percentage of White Students	No. of Schools	White No.	White %	Black No.	Black %	Hispanic No.	Hispanic %	Other No.	Other %
90-100	1	2,180	13.91	106	.57	87	2.	39	10.77
80-89	1	2,555	16.3	144	.77	202	4.64	161	16.85
70-79	3	3,104	19.8	731	3.91	174	4.	36	9.95
60-69	0	0	0	0	0	0	0	0	0
50-59	4	5,059	32.27	3,159	16.88	1,014	23.29	100	27.62
40-49	4	1,913	12.2	869	4.64	1,258	28.9	65	17.96
30-39	1	90	.57	174	.93	33	.76	0	0
20-29	1	60	.38	154	.82	44	1.01	1	.28
10-19	3	625	3.99	2,334	12.47	1,121	25.75	48	13.26
1-9	2	64	.41	1,983	10.59	380	8.73	8	2.21
Less than 1%	6	26	.17	9,064	48.42	40	.92	4	1.1
Total	26	15,676	100	18,718	100	4,353	100	362	100
% of Total		40.08		47.86		11.13		.93	

Source: This table is derived from data in the April 15, 1979 DISD Report to the District Court.

B. The District Court Erred in Establishing the Segregated East Oak Cliff Subdistrict.

The creation of one all-Black and five majority White subdistricts had a drastic negative impact on the desegregation of the DISD. This feature of the plan also justified the court of appeals' action in remanding for a new plan because it excluded a projected 26,202 (41.74%) of the system's 62,767 Black students from the desegregation process. Pet. App. No. 78253, 84a. The establishment of an all-Black East Oak Cliff subdistrict was segregatory on its face. When the plan was ordered the DISD was 42.1% Anglo, 44.5% Black and 13.4% Mexican American. Pet. App. No. 78-253, 84a. The carving out of the East Oak Cliff subdistrict transformed the balance of the DISD into a majority Anglo system, and desegregation was limited to the area thus established. The remaining area was projected by the court to be 51.3% Anglo, 32.5% Black and 16.2% Mexican American, while the East Oak Cliff district would be 1.9% Anglo, 95.3% Black, and 4.7% Mexican American.[46] *Ibid.*

The district court justified the decision to create an all-Black subdistrict by a generalized reference to "practicalities of time and distance":

> The Court is of the opinion that, given the practicalities of time and distance, and the fact that the DISD is minority Anglo, this subdistrict must necessarily remain predominantly minority or black. 412 F.Supp. at 1204.

[46] The calculation excluded Seagoville. The remaining area including Seagoville was projected at 51.88% Anglo, 32.18% Black and 15.93% Mexican American. Pet. App. No. 78-253, 84a.

But the court failed to make specific findings about the times and distances which would be involved in integrating the Oak Cliff schools or to supply any details to demonstrate what "practicalities" required that every one of the 26 all-Black schools in East Oak Cliff remain all-Black. The court of appeals was particularly justified in a remand for more findings on this point in view of the plaintiffs offer of two plans which would have provided much more integration in Oak Cliff. Plaintiffs' Plan A outlined a method to desegregate all of the schools with 45 minute maximum bus trips and Plan B would have desegregated all but 11 of the Oak Cliff schools with 30 minute maximum bus trips.

The governing principle was stated by the Court in *Green* v. *County School Board*, 391 U.S. 430, 439 (1968) when the Court held that where more promising courses of action are available there is a heavy burden to explain "a preference for an apparently less effective method." The district court's conclusory comments about the impracticality of desegregating Oak Cliff are not sufficient to validate such extensive segregation involving more than 40% of the Black students in the DISD.

The proponents of the plan to leave over 40% of the DISD's Black pupils in one-race schools in East Oak Cliff, had the heavy burden of overcoming "a

presumption against schools that are substantially disproprotionate in their racial composition". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971). The petitioners failed to demonstrate that the plan to establish an entire subdistrict of one-race schools was "genuinely nondiscriminatory". *Ibid.* In remanding for additional findings the Fifth Circuit performed its duty to "scrutinize such schools" and to place "the burden upon the school authorities ... to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." *Ibid.*

The petitioners argue that the Oak Cliff schools need not be desegregated because they changed from all-White to all-Black schools since desegregation began. This argument is flawed on several grounds. First, it simply is not true as to many of the East Oak Cliff Schools. Among the East Oak Cliff schools, are a number which were all-Black in the early 1960's.[47] Dr. Estes' list of schools which had changed from White to Black since 1965 included only 12 of the 26

[47] Nine East Oak Cliff subdistrict schools which had all-Black faculties in the pre-1965 period are Roosevelt, Ervin, Stone (converted from White to all-Black faculty), Darrell, Harllee, Johnston, Miller (converted to Black), Mills (converted to Black), Pease (converted to Black). See note 10 *supra*. The conversion of faculties from all-White to all-Black was a clear *de jure* act of segregation which may be presumed to have had a serious impact on the schools as well as the surrounding neighborhoods. A number of the other schools in the area were opened since 1965, and were either opened as all-Black schools or became all-Black shortly thereafter.

schools in the East Oak Cliff subdistrict. See note 14 *supra*. Second, the change of schools from White to Black did not occur in the context of a unitary system. Most of the changes occurred prior to the filing of the lawsuit when the DISD plainly had not dismantled the dual system and the remainder during the pendency. The most the DISD proved was that a number of schools which were once all-White became all-Black in neighborhoods of changing racial populations. There was no showing that such schools were desegregated as part of a unitary system. See Argument I, *supra*. The changes which occurred between the filing of the suit and the 1976 trial were still not in a desegregated unitary context, because there was no elementary school desegregation under the 1971 order and the secondary level integration was minimal and inadequate as the Fifth Circuit held in the 1975 opinion. 517 F.2d 92. The school district may not avoid its duty to desegregate by relying upon demographic changes in schools which took place during the operation of a dual system or which may have resulted from the board's inadequate efforts to desegregate. *Keyes, supra; United States* v. *Board of Education of Valdosta, Georgia*, 576 F.2d 37,38 (5th Cir.), *cert. denied* 99 S.Ct. 622 (1978).

The establishment of the new East Oak Cliff subdistrict, along with a rule that pupils would only be assigned to schools in the subdistrict where they lived, created a new impediment to desegregation by institutionalizing the segregation of the Black schools

of the southern DISD into a separate administrative unit. For desegregation purposes the DISD was transformed from a single unit which was 42.1% Anglo, 44.5% Black and 13.4% Mexican American, into two new units, one of which consisted of several parts which, in the aggregate were 51.3% Anglo, 32.5% Black and 16.2% Mexican American. The other unit, East Oak Cliff, would be 1.9% Anglo, 95.3% Black, and 4.7% Mexican American. Pet. App. No. 78-253, 84a. Carving out the new sub-unit hinders the process of desegregation in a manner not dissimilar in its effect to the creation of the splinter districts which the court disapproved in *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972) and *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972). Creation of the East Oak Cliff sub-district precludes meaningful desegregation of that area and should be condemned on the reasoning of *Scotland Neck* and *Wright, supra*. The fact that the new sub-unit has no independent governmental status removes from the case one of the factors which divided the Court in *Wright*. Compare the dissenting opinion of the Chief Justice in *Wright, supra*, 407 U.S. at 471 with the concurring opinion of the Chief Justice in *Scotland Neck, supra*, 407 U.S. at 491.

III. The Arguments of the Brinegar and Curry Petitioners for a Modification or Overruling of *Swann* should be rejected.

A. The Brinegar and Curry Arguments that Certain Neighborhoods must be Exempted from Participation in a Desegregation Plan are without Merit.

The Brinegar petitioners representing neighborhoods in East Dallas argue that the Court should rule that desegregated neighborhoods are not "vestiges of the dual system" and accordingly that pupils living in such areas may not be reassigned or transported as part of a desegregation plan. Pet. Br. No. 78-283, pp. 35 et. seq. The Curry Petitioners representing an Anglo North Dallas area contend that no action of the DISD has been found to have caused their area to be all-White, and accordingly no remedy should apply to North Dallas. Pet. Br. No. 78-282, p.30. The essence of the position of both groups is an objection to having minority children bused to the schools in their areas.

This Court's decision in *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973) held that in a system without a history of statutory segregation, proof of intentional segregation involving a substantial portion of the school system was sufficient basis to require a system-wide remedy. The principle was reaffirmed in *Columbus Board of Education* v. *Penick*, ___ U.S. ___, (July 2, 1979) and *Dayton Board of Education* v. *Brinkman*, ___ U.S. ___ (July 2, 1979) (*Dayton II*).

Columbus rejected an argument that *Keyes* had been implicitly overruled, and applied its principle to affirm a systemwide desegregation order. Slip opinion at 7, n.7, 14-17. See also *Dayton II,* slip opinion at 13-14.

The principles of *Keyes* apply *a fortiori* to a statutory dual system such as Dallas. Both the East Dallas and North Dallas areas were parts of the dual system which had not been dismantled when the suit was filed. No separate administration existed for either geographical area. The district court must have flexibility to include schools in any part of the system in a remedy to make it workable and effective. *Swann* calls for systemwide remedies to dismantle dual systems. It would be defeated by a doctrine such as petitioner Curry urges which would handcuff the district court and require it to recognize, or indeed to create, havens for white flight within the system. In *Swann* the court approved a modification of the school board's high school plan which was suggested by the court's expert consultant for the purpose of integrating the all-White Independence High school so it would not become a refuge in which pupils might avoid desegregation. *Swann, supra,* 402 U.S. 1, 8-9. Such flexibility should be preserved in Dallas.

If the school attendance zones of the East Dallas area are truly integrated a satisfactory plan may well be evolved which avoids transporting pupils to or from such areas. That may well be the efficient and sensible way to arrange the plan. But desegregation planners ought not be constrained in advance that

such neighborhoods may not ever participate in pairing, grouping, rezoning or other affirmative desegregation steps, because that would induce a rigidity into the situation which might well prevent the most efficient and practicable plan to eliminate one-race schools in other areas of the city.

B. The Curry Petitioners' Argument for an Overruling of *Swann* should be rejected.

Respondents disagree with virtually every assertion in Part III of the Curry Argument which calls on the court to overrule *Swann.* However we make no point-by-point rebuttal to the argument in this brief because the Court has no recently reaffirmed *Swann* last term in the *Columbus* and *Dayton II* decisions. Arguments similar to the Curry attack on busing as a remedy failed to command a majority of the Court. See the dissenting opinion of Mr. Justice Powell in *Columbus* and *Dayton II.* We refer the Court to the careful and detailed statement signed by 38 social scientists stating the current social science evidence on school desegregation, its relationship to residential segregation, and the current state of knowledge about the desegregation process which was submitted to the Court last term in *Columbus.* Brief for Respondents in No.78-610, App.1a-28a, "School Segregation and Residential Segregation: A Social Science Statement". With regard to the "white flight" issue see also the excellent summary of the research by Christine Rossell, "The Community Impact of School Desegregation: A Review of the Literature." Law and

Contemporary Problems, Vol. 42, No. 2 (Spring 1978) (Publication forthcoming. Originally presented to the National Review Panel on School Desegregation Research, Oct. 1977). With regard to academic achievement issues see Crain and Mahard, op. Cit. *supra* n. 40.

At the trial respondents called witnesses to rebut the social science testimony offered by the Curry group. The testimony summarized at pages 33-39 of the Curry brief was contradicted on virtually every point by respondents' witnesses Dr. Robert L. Crain, Senior Social Scientist for the Rand Institute, Tr.Vol.VIII 408 et seq.; Dr. Karl E. Taeuber, Prof. of Sociology University of Wisconsin, Tr. Vol. IX 126 *et seq.;* and Dr. Joe R. Feagin, Prof. of Sociology University of Texas at Austin, Tr. Vol. IX 318 *et seq.;* see also testimony of Dr. Charles L. Evans, Director of Research Program Evaluation, Fort Worth Independent School District, Tr. Vol. IX 285 *et seq.* Judge Taylor made no findings as to the merits of the Curry expert evidence. The soundness and reliability of much of the Curry testimony was strongly challenged by plaintiffs witnesses,[47] but the district court made

[47] For example, Robert Crain described one study by David Armor, a Curry witness also employed at the Rand Corporation as "bizarre, dumb" and "a very weak design". Tr. Vol. VIII 445, 447. Karl Taeuber described James Coleman's white flight study as not a sound and reliable statistical analysis. Tr. Vol. IX 152.He found another David Armor study characterized by both arithmetic errors and questionable scientific procedures. *Id.* at 182-185.

no effort to resolve the conflicts. See 412 F.Supp. at 1205, n.50. We believe that the district court was correct in not attempting to make a detailed analysis of the highly partisan educational and sociological testimony offered by the Curry group in support of their anti-busing thesis. Both courts below understood that they remain bound by *Swann* and that it ought not be lightly ignored or set aside on the basis of highly debatable social science and educational theories.

This Court's decision in *Green* and *Swann* brought a sensible pragmatic approach to desegregation of *de jure* segregated school systems. The real testimony to the workability and effectiveness of these doctrines is the fact that the schools of the southeastern part of the country, are now less racially segregated than those in any other region of the nation. U.S. Commission on Civil Rights, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT, p. 20 (Feb. 1979). The Fifth Circuit should be encouraged in its efforts to observe the principles of *Swann* with scrupulous care, because the same STATUS Report emphasizes that much remains to be done to bring about full compliance with *Brown* v. *Board of Education.*

CONCLUSION

For the foregoing reasons respondents respecfully submit that the judgment of the Court of Appeals should be affirmed.

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